95-956 (1)

Supreme Court, U.S.
FILED
DEC 12 1995
CLERK

No. _____

IN THE

Supreme Court of the United States

December Term, 1995

STATE OF FLORIDA,

Petitioner

v.

JANICE MCLEOD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEALS

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QUESTIONS PRESENTED

I

WHETHER ONCE POLICE HAVE CONSENT TO SEARCH A VEHICLE, THEY ALSO HAVE THE AUTHORITY TO SEARCH ALL CONTAINERS WITHIN THE VEHICLE WHICH MIGHT CONTAIN CONTRABAND.

II

WHETHER THE USE OF A NARCOTICS DOG TO SNIFF INSIDE OF A VEHICLE, WHEN POLICE HAVE BEEN GIVEN PERMISSION TO SEARCH A VEHICLE, GOES BEYOND THE SCOPE OF THE SEARCH WHEN THE REQUEST TO SEARCH DID NOT INCLUDE PERMISSION TO USE THE NARCOTICS DOG TO ENHANCE THE SEARCH BY POLICE.

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No. _____

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STATE OF FLORIDA,

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v.

JANICE MCLEOD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEALS

OPINIONS BELOW

The opinion of the Fourth District Court of Appeals is reported in the Slip Opinion as *State v. McLeod, Case No. 93-0534* (Fla. 4th DCA Sept. 13, 1995), and is reprinted in the Appendix of this pleading. [A-1].[1]

JURISDICTION

Jurisdiction of this Court to consider this petition for certiorari is being invoked under the Fourth Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, *United States Constitution* provides:

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1 The symbol "A" followed by the appropriate number represents a citation to the materials contained in the Appendix to this pleading.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, § 1, *United States Constitution* provides in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due sprocess of law...

Article I, § 12, *Florida Constitution* provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communication by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Two Broward County Sheriff's Department officers were in the median of a four-lane highway exercising a K-9 unit dog. One of the officers observed a vehicle following a tractor trailer too closely, and initiated a traffic stop, with the K-9 unit as backup. The officers asked the driver (Janice McLeod/ Respondent) and passenger where they were travelling from, and they gave inconsistent answers.

The officer returned Respondent's documents and asked permission to search the vehicle. Respondent asked the officer what they were looking for, and the officer told her drugs or weapons. She stated that she did not have any of those in her car. When asked again for permission to search, Respondent said, "Go ahead." The K-9 officer got his dog out of the sheriff's car, and started to search Respondent's car. The dog alerted on the purse, which was located on top of the center console between the two seats. The purse contained a kilo of cocaine packaged for street sale. Respondent and her passenger were arrested.

Respondent was charged by Information with one count of possession of cocaine in excess of 400 grams. Respondent moved to dismiss physical evidence seized from her person or vehicle arguing that the evidence was illegally seized without a warrant. Respondent argued that the stop of her vehicle was pretextual, that she was illegally detained, that she did not consent to the search of her vehicle, that the search exceeded the scope of her consent. [A-149–151]. On July 21, 1992, the trial court entered an order denying Respondent's motion to suppress. [A-167–169]. The court found that the officers were performing a valid traffic stop, that Respondent freely and voluntarily consented to the search both orally and in writing, that the officers had probable cause due to the sniff dog's alert, and that the consent extended to containers within the vehicle. The court simultaneously entered an order suppressing Respondent's statements, finding a *Miranda* violation. [A-170–172].

On February 1, 1993, the trial court entered a subsequent order granting Respondent's motion to suppress evidence. [A-173–175]. The court found that the stop was not pretextual and Respondent's consent was uncoerced. However, the trial court found that the use of the narcotics dog to search the vehicle exceeded the scope of Respondent's consent, relying on *Dominguez v. State,* 616 So. 2d 506 (Fla. 3d DCA 1992). [A-173–175].

The State of Florida filed a notice of appeal, appealing the trial court's granting of Respondent's motion to suppress. On appeal, Petitioner argued that the trial court abused its discretion in suppressing the cocaine found as a result of the dog sniff of Respondent's vehicle. The Petitioner maintained that the search did not exceed the scope of the consent to search. On appeal, Respondent argued that: (1) the trial court correctly suppressed unlawfully seized evidence obtained as a result of police officers exceeding Respondent's consent to search; (2) the trial court's finding that the search exceeded the scope of consent was not erroneous under the totality of the facts; and (3) the suppression order was supported by case law and was not erroneous.

The Fourth District Court of Appeal issued its opinion in the case on September 13, 1995. The Fourth District Court of Appeal held that the trial court made a factual finding based on the scope of consent. *State v. McLeod,* Slip Opinion, Case No. 93-0534 (Fla. 4th DCA Sept. 13, 1995) Judge Farmer, writing for the majority, stated in part:

> The factual finding of no consent should not be confused with an erroneous legal conclusion that the Constitution precludes the use of police dogs sniffing around automobiles looking for illegal drugs. *See United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (exposure of traveler's luggage, which was located in a public place, to a trained narcotics detection dog for sniffing purposes did

not constitute "search" for Fourth Amendment purposes). That is to say, in this case the police chose not to do a unilateral "sniff walk-around" the stopped vehicle. Instead they themselves, elected to seek the consent of the defendant for their search of her vehicle.

[The trial court], then, decided this case on the consent issue and not on the entirely separate theory, "a sniff is not a seizure," now being argued." (Footnote omitted.) Applying the "fundamental thing" that we review cases on the way they were decided below, we do not believe that we are free to treat this case as a canine-sniff, non-seizure case. The police chose the avenue of consent to travel on, and once down that highway we cannot place them on the "correct" one.

* * *

...[I]t is plain to us that the trial judge's resolution of the facts was that defendant's actual consent did not encompass the use of the dog and that nothing in the surrounding circumstances implies that it did. *State v. McLeod,* Slip Opinion at pp. 2–4.

On September 25, 1995, Petitioner filed a Motion to Stay Mandate Pending United States Supreme Court Review with the Fourth District Court of Appeal. Respondent filed a response opposing Petitioner's motion on October 3, 1995. The Fourth District Court of Appeal filed an Order on October 17, 1995 granting Petitioner's motion to stay.

REASONS FOR GRANTING THE WRIT

I.

WHETHER ONCE POLICE HAVE CONSENT TO SEARCH A VEHICLE, THEY ALSO HAVE THE AUTHORITY TO SEARCH ALL CONTAINERS WITHIN THE VEHICLE WHICH MIGHT CONTAIN CONTRABAND

Petitioner, the State of Florida, maintains that the Fourth District Court of Appeal has misapplied the Fourth Amendment of the United States Constitution in its opinion issued in *State v. McLeod,* Slip Opinion, Case No. 93-0534 (Fla. 4th DCA Sept. 13, 1995). The instant petition for certiorari is being filed on the basis that the Fourth District has misconstrued the Fourth Amendment as it applies to the search of a vehicle after voluntary consent has been given to search.

The Fourth Amendment governs the legality of searches and seizures. It protects persons from unreasonable governmental intrusion into their legitimate expectations of privacy. *U.S. v. Chadwick,* 433 U.S. 1, at 7, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). *See United States v. Lovell,* 849 F. 2d 910, 914 (5th Cir. 1988).

The Fourth District Court of Appeal's decision in the instant case has the effect of holding that although a police officer may have voluntary consent to search a vehicle, the officer does not have consent to search any containers in the vehicle even if the person who consents does not narrow the scope of the search either verbally or physically. This holding is contrary to consent search cases ruled upon by this Honorable Court. In *Florida v. Jimeno,* 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed. 297 (1991), *on remand, State v. Jimeno,* 588 So. 2d 233, this Court held that there is no violation of a suspect's Fourth Amendment right from an unreasonable

search when a police officer opens a closed paper bag found on the floor of a vehicle after the suspect gave the officer consent to search the vehicle. In *Jimeno,* the police officer was given consent to search the suspect's vehicle after a traffic stop. Authorization to search extended beyond the car's interior and included the paper bag, since the suspect did not explicitly limit the officer's search.

In *Jimeno,* this Court looked to *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), and stated that "we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Florida v. Jimeno,* 114 L.Ed.2d at 302. This Court reaffirmed the "objective reasonableness" standard for determining whether a search was conducted within the scope of consent — "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Id. *See also Illinois v. Rodriguez,* 497 U.S. ___, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). Therefore, here, the Respondent's general consent to a search of her automobile included a search of her purse. *See Jimeno, supra; United States v. Ross,* 456 U.S. 798, 820-821, 102 S.Ct. 2157, 2170-71, 72 L.Ed. 2d 572 (1982). "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited to the possibility that separate acts of entry or opening may be found and is not limited to the possibility that separate acts of entry or opening may be required to complete the search." *United States v. Ross,* 456 U.S. 798, 820-821, 102 S.Ct. 2157, 2170-2171, 72 L.Ed. 2d 572 (1982).

In the instant case, Respondent gave the police officer consent to search the vehicle. Respondent did not curtail the search in any respect. It was reasonable to believe that when the officer asked consent to search Respondent's car for contraband, the officer would also include Respondent's purse as part of that search since the purse was sitting on

top of the console in the car, and the purse was large enough to contain contraband. Also, the consent to search was unconditional.

In *California v. Acevedo,* 500 U.S. ___, 111 S.Ct.___, 114 L.Ed. 2d 619 (1991), this Court also determined that a warrantless search by police of a paper bag which was found in an automobile trunk was allowed under the Fourth Amendment, based on the probable cause that the bag contained marijuana. In *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), this Court held that police may conduct a search of a car that is as thorough as a magistrate could authorize in a warrant "particularly describing the place to be searched." "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *U.S. v. Ross,* 72 L.Ed.2d 594. This Court held that a warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment. *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) "The general rule is that a search warrant is required to open a package (*other than a package found in a vehicle*) and look inside." [Emphasis added.] *United States v. Jacobsen,* 466 U.S. 109, 114, 104 S.Ct. 1652, 1656, 80 L.Ed. 2d 85 (1984).

Since the trial court held that the stop of Respondent's vehicle was valid, and Respondent gave voluntary consent to search her vehicle, the police had the authority to search inside the car, including any containers which were inside the car at the time of the search. Once police had consent to search the car, the police would have inevitably discovered the drugs when they opened the purse, which was lying on the console inside the car. After police began the search, Respondent did not seek to exclude her purse from the search. She did not attempt to keep the purse with her and out of the car. Respondent left her purse on the console inside

the car. The Petitioner maintains that once Respondent gave consent to allow police to search her vehicle, the police also had the authority to search any containers (i.e., Respondent's purse) which may have contained contraband. The Fourth District's opinion in this case misconstrues the Fourth Amendment. This Court should exercise its certiorari jurisdiction to review the case at bar.

II.

WHETHER THE USE OF A NARCOTICS DOG TO SNIFF INSIDE OF A VEHICLE, WHEN POLICE HAVE BEEN GIVEN PERMISSION TO SEARCH A VEHICLE, GOES BEYOND THE SCOPE OF THE SEARCH WHEN THE REQUEST TO SEARCH DID NOT INCLUDE PERMISSION TO USE THE NARCOTICS DOG TO ENHANCE THE SEARCH BY POLICE

In the past, this Court has determined that a dog sniff is not a search. The facts of the instant case reveal that once Respondent gave consent to search her car, the police were not required to seek additional consent to use a canine to sniff around the vehicle.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick,* 433 U.S., at 7, 53 L.Ed. 2d 538, 97 S.Ct. 2476. We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. *Id.,* at 13, 53 L. Ed. 2d 538, 97 S. Ct. 2476. A canine "sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the

contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here — exposure of respondent's luggage, which was located in a public place, to a trained canine — did not constitute a "search" within the meaning of the Fourth Amendment. *United States v. Place,* 462 U.S. 696, 707, 77 L.Ed.2d 110, 120, 103 S.Ct. 2637 (1983).

In determining whether the use of a dog to enhance or replace the natural senses of a police officer constitutes an unreasonable search, the court must determine whether the party subject to the search had a reasonable expectation of privacy considering the circumstances of each case. *United States v. Solis,* 536 F.2d 880 (9th Cir. 1976). Many cases have held that the use of certain sense-enhancing instruments to aid in the detection of contraband does not constitute an impermissible Fourth Amendment search. *See United States v. Lee,* 274 U.S. 559, 563, 47 S.Ct. 746, 71 L.Ed. 202 (1927) (opinion of Brandeis, J.) (use of boat searchlight "not prohibited by the Constitution"); *United States v. Hood,* 493 F.2d 677,

680 (9th Cir.), *cert. denied,* 419 U.S. 852, 95 S.Ct. 852, 42 L.Ed.2d 84 (1974) (flashlight used to look into car at night "did not constitute a search..."); *United States v. Minton,* 488 F.2d 37, 38 (4th Cir. 1973), *cert. denied,* 416 U.S. 936, 94 S.Ct. 1936 (1974) (use of binoculars); *Cobb v. Wyrick,* 379 F.Supp. 1287, 1292 n.3 (W.D. Mo. 1974) (use of flashlight).

The Fourth District Court of Appeal's opinion in the instant case relied on *Dominguez v. State,* 616 So. 2d 506 (Fla. 3d DCA 1993). The search in *Dominguez* involved consent to search the defendant's apartment. The *Dominguez* court held that *United States v. Place* did not apply to the facts of the *Dominguez* case; the court stated that *Place* dealt with a canine sniff of luggage during a *Terry*[2] stop. However, the search in *Dominguez* did not deal with that issue. Therefore, *Place* was inapposite to the facts of the *Dominguez* case.

The *Dominguez* court also determined that "the officers exceeded the scope of the consent by bringing the narcotics detection dog on the premises. 'The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" *Dominguez v. State,* quoting *Florida v. Jimeno,* 500 U.S. ___, ___, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297, 302 (1991)(citation omitted).

This Court has previously made a distinction between a search of an apartment and a search of a vehicle. *See U.S. v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence); *California v. Carney,* 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) (less rigorous warrant

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2 *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968).

requirements govern search of automobile; expectation of privacy is significantly less than that relating to one's home or office). It is clear that this Court has construed the Fourth Amendment as giving a person a greater expectation of privacy in one's home than in one's vehicle. Therefore, the *Dominguez* case relied upon by the Fourth District is inapplicable here because the defendant's circumstances in the *Dominguez* case deserved a greater privacy expectation than the defendant's circumstances surrounding the facts of the instant case.

The Fourth District incorrectly held that the police exceeded the scope of the consensual search of Respondent's car by using the canine inside the car without Respondent's permission. If a dog sniff is not a search, then police do not need permission to allow a dog to sniff luggage or other containers located in a car. This is especially so since Respondent had already given police her permission to search the car for contraband. (*See* Point One.) Therefore, this Court should accept the Petitioner's petition for certiorari and review the instant case. *See Place, supra; U.S. v. Lovell, supra.*

CONCLUSION

For these various reasons, the Petitioner respectfully requests this petition for certiorari to be granted.

Respectfully submitted,

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IN THE

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,
Appellant,

v.

CASE NO. 93-0534
L.T. Case No. 90-22943 CF10A

JANICE McLEOD,
Appellee.

Opinion filed September 13, 1995

Appeal from the Circuit Court for Broward County.
Stanton S. Kaplan, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Melvina Racey Flaherty, Assistant Attorney General, West Palm Beach, for Appellant.

Richard L. Rosenbaum of the Law Offices of Richard L. Rosenbaum, and Michael J. Entin of the Law Offices of Michael J. Entin, Fort Lauderdale, for Appellee.

FARMER, J.

In his written order granting defendant's motion to suppress evidence, the trial judge found that defendant consented to the search of her auto and that her consent was not coerced. He then explained his decision as follows:

> "This Court concludes however, that the search actually conducted in this matter exceeds the scope of the consent given. 'When the police are relying upon consent to conduct a warrantless search, they have no more authority than that reasonably conferred by the terms of the consent.' *State v. Wells,* 539 So.2d 464, 467 (Fla. 1989).

> "In the present case, the consent given by McLeod could reasonably be construed to allow the officers to search the interior of her vehicle. Subsequent to consent being given, the officers utilized a narcotics detection dog to search the vehicle and its contents.
>
> "The Court finds that the officers exceeded the scope of the Defendant's consent by utilizing the narcotics dog to search the vehicle without her expressed permission. The court further finds that there was no specific request for consent to use the drug detection dog, and that *no circumstances existed from which consent to the use of the drug detection dog could reasonably be implied.*" [e.s.]

The italicized part of the quotation from the order on review shows that it was a *factual* finding that the judge made on the scope of consent, not a categorical or *legal* one. Because there is substantial competent evidence to support his findings, we are required to accept them.[1]

The factual finding of no consent should not be confused with an erroneous legal conclusion that the Constitution precludes the use of police dogs sniffing around automobiles looking for illegal drugs. *See United States v. Place,* 462 U.S. 696, 103 S. Ct. 2637, 77 L.Ed.2d 110 (1983) (exposure of traveler's luggage, which was located in a public place, to a trained narcotics detection dog for sniffing purposes did not constitute "search" for Fourth Amendment purposes). That is to say, in this case the police chose not to do a unilateral "sniff walk-around" the stopped vehicle. Instead they, them-

---

1 Hence, if on these same facts the trial judge had found that defendant consented to a search by the dog, we would also agree to affirm without any hesitation.

selves, elected to seek the consent of the defendant for their search of her vehicle.

Judge Kaplan, then, decided this case on the consent issue and not on the entirely separate theory, "a sniff is not a seizure," now being argued.[2] Applying the "fundamental thing" that we review cases on the way they were decided below, we do not believe that we are free to treat this case a canine-sniff, non-seizure case. The police chose the avenue of consent to travel on, and once down that highway we cannot place them on the "correct" one.

The state apparently believes that, because there was a barking dog in one of the police cars at the scene, defendant impliedly consented to search with the dog, as to the presence of which she had actual or constructive knowledge. The stated facts, however, imply that the judge accepted her testimony that she did not see any dog after she was stopped by the officer and did not know that one was present when she consented to the search.

In this case, however, it was the *passenger* and not defendant who testified that he heard the dog barking at the scene of the stop. There was also evidence that defendant had earlier seen a dog in a police car when she passed it on the highway. Recognizing, however, that the evidence regarding the barking dog,[3] and the earlier glimpse was before the

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2 The refrain argued by the state in this court is (with profound apologies to Dooley Wilson):

> "You must remember this,
> a sniff is just a sniff,
> a search is just a search,
> the fundamental things apply. . . ."

3 We do not understand how the *passenger's* knowledge has any relevance on the factual inquiry as to the scope of *driver's* consent.

judge[4] it is plain to us that the trial judge's resolution of the facts was that defendant's actual consent did not encompass the use of the dog and that nothing in the surrounding circumstances implies that it did.

We also note that in *Dominguez v. State*, 616 So.2d 506 (Fla. 3d DCA), *rev. denied* 624 So.2d 268 (Fla. 1993), the search concerned a person's house, rather than an automobile, and that the law recognizes a greater expectation of privacy in a house than an automobile. The *Dominguez* court pointedly stated that no dog was present when the consent was given, thereby implying that as a matter of law the consent given did not authorize the use of a dog.

AFFIRMED.

GUNTHER, C.J., and WARNER, J., concur.

---

4 The trial judge obviously placed little weight on that testimony. The judge's resolution in favor of defendant actually requires that any inference drawn from these facts go in the defendant's favor, not the state's.

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA.

STATE OF FLORIDA

Case No. 90-22943 CF

vs.

Fort Lauderdale, Florida

JANICE McLEOD, August 1, 1991

Defendant. 4:00 p.m.

PROCEEDINGS WHICH CAME ON FOR MOTION TO SUPPRESS BEFORE THE HONORABLE STANTON S. KAPLAN, PRESIDING JUDGE, AT THE BROWARD COUNTY COURTHOUSE, FORT LAUDERDALE, BROWARD COUNTY, FLORIDA, ON THE 1ST DAY AUGUST, 1991, COMMENCING AT 4:00 O'CLOCK P.M.

APPEARANCES:

DALE GEISLER, Assistant State Attorney appearing on behalf of the State of Florida

MICHAEL JAMES ENTIN, ESQ., appearing on behalf of the Defendant.

[vol. I, pp. 1–131]

Thereupon:

The following proceedings were had:

THE CLERK: Janice McLeod.

THE COURT: Who is your first witness?

MR. GEISLER: Steven Rubino.

MR. ENTIN: I would invoke the Rule at this time, as well.

Thereupon:

STEVEN RUBINO was called as a witness on behalf of the State, and being first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION:

BY MR. GEISLER:

Q Sir, state your name, please.

A Steven Rubino.

Q Who is your employer?

A Broward Sheriff's Office.

Q What are your duties and responsibilities with BSO?

A Currently a detective in the Criminal Investigations Unit.

Q What was your employment status in November of 1990 with BSO?

A I was deputy sheriff on road patrol at the time.

Q How long did you have that position, the beginning to the ending dates?

A In road patrol at that time?

Q Yes, approximately.

A Maybe a year.

Q And what were your duties or responsibilities as a road patrol officer with the Broward Sheriff's Office during that period of time?

A Routine answering of calls, traffic enforcement, basic protecting and serving the community.

Q Marked unit?

A Yes.

Q In uniform?

A Full uniform.

Q Were you so employed on November 7, 1990?

A Yes, I was.

Q On that date, did you have occasion to come in contact with a person now known to you as Janice McLeod?

A Yes, I did.

Q Is that person in court today?

A Yes, sir.

Q Could you point out that person?

A Woman in the white next to Mr. Entin.

MR. GEISLER: Let the record reflect the witness has identified the defendant, Mrs. McLeod.

THE COURT: Right.

Q Deputy, what caused you to come in contact with Miss McLeod on November 7, 1990?

A I effected a traffic stop on her vehicle on U.S. 27.

Q Approximately where on U.S. 27?

A Final stop was probably approximately four — three and a half, four miles north State Road 84.

Q On State Road 27?

A Yes, U.S. 27.

Q Do you know about the time of day or night you effected the stop?

A I don't recall exactly. It was around dusk.

Q Early evening hours?

A Yes.

Q What caused you to come I contact with her to effect a stop?

A Myself and Deputy Fortunato, who is K-9 unit, were sitting in the median strip on U.S. 27. He was exercising his dog and throwing his exercise ball or whatever it is for his dog in the grassy area. It's a real wide median strip and we were just talking and I saw a semi-tractor trailer northbound on U.S. 27. It was a flatbed type.

Q While you were in the median strip?

A While we were talking. Cars were stopped. We were out of our cars. The dog was out of the car. I saw the tractor trailer coming. As it passed us, I saw a vehicle following real close behind the tractor trailer.

Q Approximately how close?

A I'd say less than two car lengths.

Q And could you approximate the speed of the tractor trailer as you observed?

A I would say it was doing the speed limit. Speed limit was 55. 60 miles an hour.

Q Then you saw a smaller car behind the tractor trailer?

A Right, champagne-colored vehicle right behind the tractor tailer [sic]. I made a comment to Deputy Fortunato. I said, that car's traveling awfully close to the tractor trailer.

Q Less than two car lengths?

A It was very close.

Q As a result of that observation, did you do anything?

A I made the comment to Deputy Fortunato — I told him, I'm going to go stop the car. I got in my car and went after the car and he got in his after he put his dog away and he came and backed me up.

Q Were you driving a marked unit?

A Yes.

Q Were you in uniform?

A Yes.

Q How about Deputy Fortunato, if you remember?

A Same, in uniform.

Q What direction did you go on 27 to effect the stop?

A Northbound.

Q About how far did you have to go from where you first observed the vehicle driven by Miss McLeod until you actually stopped her, any idea?

A Wasn't very far at all, maybe a mile.

Q Okay. How did you stop her?

A I activated my blue lights.

Q Did she pull over?

A Yes, she pulled over immediately. There was no problem.

Q Obviously; you pulled over ahead of her or behind her?

A Behind her.

Q How far was your vehicle from Miss McLeod's vehicle when you came to a stop?

A I say approximately a car length.

Q What happened at that time?

A I approached her vehicle on the driver's side. I looked in and I made contact with her. I asked for her driver's license and her registration.

Q You said she. Who was driving that vehicle?

A I'm sorry. Miss McLeod.

Q You asked for driver's license?

A Registration.

Q Did she produce them?

A Yes, she did.

Q When she produced those documents, where was she in relation to where you were at the stop?

A She was still seated in the car.

Q Did there come a time where she exited the vehicle in your presence?

A Yes.

Q Do you know why?

A I don't recall if I asked her to step out or if she stepped out on her own. I really don't remember. After I took her driver's license, I explained to her why I stopped her, asked her where she was coming from, where she was going, basic questions.

Q What did you say to her when you explained why she was stopped?

A I told her — I told her for following too close to the tractor trailer.

Q What did you do next?

A I told her I'd be right with her after I asked her the series of questions that I just mentioned and I walked back to my unit, my police car and Deputy Fortunato was there. He took a position on the right rear of Miss McLeod's car as a backup. So, I walked back to my unit, where I was — proceeded — I made up my mind I was going to give her a warning ticket and I proceeded to do that.

Q What's a warning ticket?

A Just rather than a verbal warning, rather than a citation, it's just a written — a short written ticket, looks like a citation but it's not.

Q Did you, in fact, do that?

A Yes, I did.

Q Did you, in fact, present her with any documentation?

A Well, after I went back to my unit, Deputy Fortunato walked over to where I was. I finished with the warning ticket. I walked back to Miss McLeod. That's the time — I don't remember if I asked her to step out of the car or if she was already out of the car. I just don't recall.

Q But she was out of the car at that time?

A When I walked back up.

Q What happened then?

A I handed back stuff, her license, the warning thing and that's when I asked her — getting back to before, when I asked her, still sitting in the car, where she was coming from and going. She was coming from Miami and going up to her home, I believe, which is in Belle Glade.

When I was walking — when I went back to my vehicle, Deputy Fortunato had spoken to the — there was a black male in the passenger seat of the car, asked him a series of questions.

Q Could you hear the conversation between Deputy Fortunato and the occupant?

A No.

Q Then Deputy Fortunato came back to your position?

A Right.

Q He made some comment to you?

A He asked me what she had said about where she had come from, what have you. I said she told me they were coming from Miami. He said they were coming from the flea market over on Sunrise Boulevard. I thought that was a little inconsistent. I asked her again to clarify where she said she was coming from. She said Miami again and at that point, when I handed her documents back to her, I explained to her that routinely, as part of our duties of enforcement, we ask traveling public for permission to search their contents of the car.

Q When you made that statement, where were you in relation to your car and her car, which was in front of your car?

A I believe we were standing right behind her car, right behind, to the left, on the driver's side but closer to her than my car.

Q And was the passenger of the vehicle still in the passenger seat, to your knowledge, when that conversation took place?

A Yes.

Q Now, you said you made some comments to Miss McLeod regarding additional activities you had. What did you tell her?

A I explained to her, after I handed her back her documents, also, as part of our routine duties, we ask the public for consent searches of their vehicles.

Q What did you say to her? Can you remember pretty close to what she said?

A That's basically it. I explained to her, just as a routine part of our duties out here, we also ask the public that's traveling on the roadways for consent search of their vehicles for drugs or weapons.

Q After you asked her or made those statements to her, did she respond in any way?

A She stated — I asked her if she would consent to search her car. She said, what are you looking for as to clarify what I already said. I said, drugs or weapons. She said, I don't have any of those in my car. I asked, would it be okay for us to look. She said, go ahead.

Q In relation to that statement by her to go ahead, when did you issue the written warning?

A That was already given back to her.

Q The written warning was already presented to her prior to your comments?

A Registration and license and I don't recall if I had her insurance card or not. I don't remember. And I folded up her registration and I folded the warning citation and handed it back to her with her driver's license.

Q Let me show you what will be marked State's Exhibit A for identification and ask you if you can identify that, please.

A Okay. That's our normal warning tickets. It's filled out to Miss McLeod.

Q That is a copy; is that correct?

A Yes.

THE COURT: Are you contesting that he had a right to stop her?

MR. ENTIN: Yes, I'm contesting he had a right to stop her, but I have no objection to the warning coming in.

THE COURT: You're objecting that he had right stop her initially?

MR. ENTIN: Absolutely.

THE COURT: Okay.

MR. GEISLER: By stipulation, this is a duplicate of the original for the purposes of the hearing.

THE COURT: All right. It's in. State's 1 in evidence.

Q All right. That was handed, State's Exhibit 1, which is the citation or written warning, was issued to her before the conversation regarding consents to search?

A That's correct.

Q As a result of her consent to search for drugs or weapons, what, if anything, did you do at that point or did you observe at that point?

A Deputy Fortunato was standing with us at the time. He went back to his patrol car, got his dog out of the car and brought him forward and began to search, and the dog subsequently alerted on the purse that was in the center of the two seats in the console.

Q Did the dog alert in your presence?

A I was standing — We asked the passenger to go ahead and get out of the car. He got out of the car. I moved Miss McLeod and the passenger a little further to the right side of the vehicles. There was a guard rail there. We moved them a little closer to the guardrail and Deputy Fortunato proceeded with the search and I was still standing with Miss McLeod. And I saw the dog walking around, saw the dog get in the car and then I saw Deputy Fortunato take the black purse out of the car and signal to me that he had found some drugs and that was when we placed them under arrest.

I don't know what happened inside the car because I wasn't there.

Q When you first saw what turned out to be cocaine, how was it contained?

A When I first saw it, it was still half in and half out of the black purse.

Q Did you take possession of the purse and the contents?

A Then at that time we walked both the subjects and sat them down on the guardrail. We come to find out Miss McLeod was pregnant at the time or said she was pregnant, just sat her down, sat both the subjects down. Deputy Fortunato continued with the rest of the search, brought the stuff — the bag and the cocaine in my car, put his dog away and then we proceeded to put both subjects in my vehicle and transport them back to the substation.

Q Did there come a time where Miss McLeod was advised of her *Miranda* warnings?

A Not till we got back to the substation.

Q At the substation, where is the substation located?

A At the time, it was on Weston Road, 1010 Weston Road, which it's about four miles south of State Road 84 on Weston Road.

Q She was transported in your marked unit?

A Yes.

Q When you got back to the substation on Weston Road, was she advised of her warnings?

A We sat both the subjects down, proceeded to do our paperwork. She was advised of the *Miranda*, asked to sign consent for the previous search after she gave it verbally, which she did, and that was basically it. She proceeded to exhonerate the subject in the car with her. She told us he had nothing to do with it. He wasn't involved, just there for the ride. We really didn't have any evidence otherwise and he was let — you know, we let him go.

Q Who advised Miss McLeod of her *Miranda* Warnings?

A I did.

Q How did you do that?

A By card, by preprinted card.

Q Did she respond to the warnings?

A Yes.

Q How did she do it?

A She said she understood.

Q Did she make any statements to you or in your presence subsequent to you reading the *Miranda* warnings to Miss McLeod?

A She told us that she had picked up the stuff, the cocaine in Miami and was taking it for — to meet with someone in Palm Beach County in a park. She said she had to meet the subject in a park up in Palm Beach County.

Q Did she refer to the contents of the purse as cocaine or what did she say?

A To be honest, I really don't remember the conversation after we were all sitting around one table doing the paperwork. After she signed the consent form and I was asking her the pertinent questions for the paperwork, I believe I asked her, you know, how much were you getting paid to do this or something along those lines.

Q Did she respond?

A I don't remember her saying how much she was getting paid or if she was at all. Basically, her only statement was she was picking it up in Miami and she had to meet — make a meet with somebody in Palm Beach County at a park somewhere.

Q Did you prepare any written documents in this case?

A Yes.

Q Would referring to those possibly refresh your recollection regarding money she's being paid?

A Could, yes.

MR. ENTIN: Is that his report?

MR. GEISLER: Yes.

Q Let me show you the Probably [sic] Cause Affidavit, specifically about the last three or four lines. Does that document refresh your recollection regarding any statements she may have made after *Miranda* warnings?

A My PC states this was filled out on the day the event occurred. It states in here that she made the statement she was paid $1,000.00 to mule the stuff from Miami to Belle Glade. Sitting here today, I don't — You know, it's in my report she said it, but sitting here now, I definitely remember her saying she picked it up in Miami and had to make a meet in Palm Beach.

Q Earlier, you alluded to a consent that was signed by Miss McLeod.

A Yes.

Q Was that consent signed in your presence?

A Yes, it was.

Q Where was that signed?

A That was also at the substation.

Q Okay. Let me show you a Xerox of State's Exhibit 2 for identification and ask if you can identify that, please.

MR. GEISLER: Again, Your Honor, by stipulation, the document is a Xerox copy.

THE WITNESS: This is a Consent to Search form signed by Miss McLeod, witnessed by myself and Deputy Fortunato.

Q That was on the day of the arrest?

A. Yes.

Q That was signed by the defendant in your presence?

A Yes.

Q And does your name appear anywhere on the document?

A Yes, I'm the second witness on the line.

Q You physically saw her sign the document?

A Yes.

MR. GEISLER: Your Honor, at this time I would move State's Exhibit B into evidence as State's 2.

THE COURT: Be received.

Q Deputy, again, showing you State's Exhibit 1 in evidence, the warning citation or the written warning, have you had occasion, as a police officer, during the year that you were on road patrol to issue written warnings for following too closely? Let me stop at that point. Did you ever write more than one?

A I've written several warning tickets.

Q Did you follow up with the statements to the particular people regarding consent to search and follow-up with searches of their vehicles?

A I have done that, yes.

Q But have there been occasions where you did not follow up with consent to searches after you would issue a written warning?

A Oh, yes, definitely.

MR. GEISLER: That's all I have of this witness.

CROSS-EXAMINATION

BY MR. ENTIN:

Q Officre [sic], how long have you been with BSO?

A Eight and a half years.

Q And prior to working road patrol, what where your primary duties?

A Well, I was with Indian River County Sheriff's two and half years. Majority of my time has been spent working narcotics.

Q And would it be fair to say you were in the drug interdiction unit prior to being assigned to road patrol?

A I was several years ago, yes.

Q What years were you in the drug interdiction unit?

A I believe '85 through '87.

Q And you worked continuously between 1985 and 1987 in that unit?

A In that particular unit, yes, I believe so.

Q Your primary function in that unit was to intercept drugs at airports, bus stations, and train stations?

A Yes.

Q Is that correct?

A That's correct.

Q Okay. And you did that on approximately how many occasions between '85 and '87?

A Couldn't even guess.

Q Over 500?

A Arrests or contacts?

Q Contacts.

A Oh, yeah, I would say over 500.

Q Can you tell me how many allegedly consensual searches you conducted between '85 and '87 in the drug interdiction unit where you made arrests?

A I would just be speculating. I couldn't even guess.

Q Best estimate you can provide.

A Only thing I can tell you, between a ten-month period for 1985 when I kept some statistics and data, we made 113 arrests during that period. The rest of the time,I couldn't tell you.

Q So, you had extensive experience with contacting persons doing nothing wrong and asking them for consensual searches of themselves or bags during that period of time; is that correct?

A Well, it was random contacts, yes.

Q Persons you had really no probably cause [sic] or belief had done anything wrong but in a two-year period, you would go up to on buses, trains or airports and ask them to search them?

A We would conduct random contacts.

Q Is that correct?

A Yeah.

Q You utilized that experience in this particular case?

A No, sir.

Q Now, how long have you been on road patrol this time?

A At that point, like I said, about a year.

Q About a year?

A Yes, sir.

Q And what zone were you working?

A 804 zone that day, which is the west end of the county.

Q That encompasses U.S. 27 and Alligator Alley?

A Yes.

Q And based on your experience in road patrol, is that an area that you were aware of was an area that was for trend shipments of narcotics?

A I was aware they made some arrests out there.

Q When you stopped Miss McLeod, you indicated that was an area that was known for movement of narcotics through this state.

A Yes, it is.

Q And how many months or days had you worked that particular area?

A The zone?

Q Yes.

A Pretty much would switch daily, so there's not a permanency there with the zone.

Q Okay. Well, in your best estimate, how may days or months did you work that particular zone?

A Over the year period?

Q Yes.

A I would probably say best thing was once a week. We have five or six zones we pretty much rotate throughout.

Q During that year that you were working there, would you focus, as part of your road patrol duties, on searching people in vehicles to determine whether there was trans-shipping of narcotics?

A I wasn't focusing on that. I was well aware that arrests had been made on Alligator and U.S. 27.

Q How did you become aware of that?

A Just people told me they had made arrests out there. The Organized Crime Division had made arrests out there, things like that.

Q Now, when you were in that particular area on that date and you first observed the vehicle that Miss McLeod turned out to be in, you had no previous knowledge that that vehicle had been involved in any criminal activity; is that correct?

A Other than the traffic violation, no.

Q Is that correct?

A That's correct.

Q You had no knowledge of the occupants of that vehicle; is that correct?

A That's correct.

Q And you were specifically where in relation to Alligator Alley when you first observed the vehicle, north or south?

A North.

Q You were north of Alligator Alley?

A Yes.

Q You're certain of that?

A Absolutely.

Q Approximately how far north of Alligator Alley were you?

A Okay. I don't know if you're aware of it, but Alligator Alley turns into I-75. Okay. I would say two or three miles north of I-75 or State Road 84, which is synonymous there.

Q You were in the middle of the road, playing with the dog; is that correct?

A We were parked in the median strip and Deputy Fortunato had his dog out of the car, and he was tossing — I don't remember if it was a ball or his rag or whatever it was that the dog chases around.

Q Is there some particular reason you were doing that or just passing the time?

A Just basically —

Q Playing ball in the middle of the road.

A He was exercising his dog was the basic means for him doing what he was doing. I was just talking to him.

Q Isn't it considered dangerous doing it in a median strip of a highway?

A He wasn't tossing the ball 50 yards down the road.

Q Speed limit's 50 miles an hour on the road?

A That's correct.

Q Is it something you've done there before?

A I haven't personally, no.

Q How many persons have you written citations for tailgating in the last year prior to her arrest?

A Citations?

Q Yeah. Probably none?

A I don't think I have written a citation for that, but I've warned plenty of people.

Q For tailgating?

A Yes, sir.

Q Okay. Now, is it your testimony today that you just happened to randomly be in that median with Detective Fortunato and the dog?

A With Deputy Fortunato, yes, sir.

Q Is that correct?

A Yes, sir.

Q You did not have a plan with him that day to have him in that area so you could make stops and determine

whether people would consensually agree to have their car searched?

A No, sir. It was getting late in the evening anyway. It was dusk.

Q But my question is you had no formulated plan with Detective Fortunato to have that dog there, available for you so you could, based on your experience, stop people and ask to search their cars?

A No. My experience is a lot different than auto interdiction, also, anyway, so, no, it was not for that purpose.

Q I had an opportunity to look at the dog records of Dog Pulching, which is handled by Detective Fortunato and seen that there are numerous stops on U.S. 27. Have you been involved with those?

A No, sir.

Q To the best of your knowledge, this is the first time that you had been involved with Officer Fortunato in reference to drug searches?

A I don't remember ever being involved in a seizure with Deputy Fortunato.

Q The semi-tractor trailer you observed, when did you first observe that?

A While we were standing there in the median strip.

Q Did you see it approaching you?

A Saw it coming northbound.

Q When did you see her vehicle, when it was coming northbound?

A When I saw the tractor trailer, it was in the left-hand lane. I didn't notice the car. When they got closer, that's when I noticed the vehicle.

Q How far away did you see the tractor trailer?

A I don't know.

Q You saw it approaching?

A Yes.

Q Then when you indicate the tractor trailer comes up to where you're playing ball, you see her car behind?

A Yes.

Q How far was that car behind?

A Like I said earlier, it struck me as being very close. That's why I noticed it. And my best estimate would be less than two car lengths.

Q And how far is the car supposed to be behind a tractor trailer doing 50 or 60 miles an hour?

A Between a car length per ten miles an hour.

Q So, it would be five or six car lengths?

A Yes, sir

Q So, she was within three car lengths too close and that alarmed you?

A I felt she was extremely close, yes.

Q When you started to go after her, you're telling this court you had no intention of that car being involved with carrying drugs?

A I had no reason to.

Q To be suspicious of that car carrying drugs. Can you tell me why, if you know, Deputy Fortunato was also — do you know why it was necessary to have Deputy Fortunato follow you to effectuate a stop for tailgating warning?

A I didn't tell him to follow me. I told him, basically, Pete, look how close that car is. I'm going to stop it. I got in my car and went after the vehicle. He got in his and came up and backed me up. It's extremely routine that an officer will back up another one when they're pulling a traffic stop.

Q Don't you customarily make traffic stops on your own?

A Sometimes.

Q So, was there any discussion about him following you to that scene?

A No. I just said I'm going to stop it. I jumped in my car and made a U-turn , went after it. The dog was still out of his car. He had to put the dog away and came up and pulled up behind me.

Q Your testimony was there was no plan to have the dog come to the scene?

A No, he wasn't there. He pulled up to back me up.

Q Now, they stopped in a prudent manner; is that correct?

A Yes, sir.

Q Nothing else unusual about her driving?

A No, sir.

Q She going approximately the speed limit?

A Yes.

Q When you got up to her vehicle, did you follow for a period of time before you put on your emergency equipment?

A No. When I got close enough, I effected a stop as soon as I was close enough.

Q Where was the tractor trailer truck when you pulled up behind her?

A He kept going.

Q He was off in the distance, wasn't he?

A We had slowed down and pulled over. He just kept going.

Q How close was she behind the tractor trailer truck when you were following her?

A I didn't follow her. I pulled over as soon as I got up to her.

Q How close was she to the tractor trailer truck when you got up to her?

A I don't recall. She was following too close when I saw her.

Q When you finally got up to her, was the tractor trailer considerable in front of her, more than five or six car lengths?

A I don't remember.

Q So you don't recall whether her driving violation had ceased at the time that you stopped her pertaining to the tractor trailer?

A I saw the violation happen a mile or two back from where I was — where I stopped her. That's what I was stopping her for, the violation then that occurred.

Q It took you a mile or two to catch her?

A Yeah, I'd say a mile, mile or so.

Q She pulls her vehicle over routinely; is that correct?

A She pulled over immediately.

Q You asked for license and registration; she provided that to you without objection or difficulty; is that correct?

A That's correct.

Q And do you have any discussions with her inside her car before you go and check the information?

A I asked her where she was coming from, where she was going, that type of routine questioning.

Q She didn't appear to be nervous at all, did she?

A No, not really.

Q Didn't display any unusual behavior, did she?

A No.

Q You go back and you run the name on the computer; is that correct?

A I believe I just ran her driver's license.

Q Came back okay?

A Yes.

Q And then do you ask her out of the vehicle or do you have a discussion with her in the vehicle?

A I don't recall if she stepped out on her own or if I asked her to step out.

Q Did you ask her to step out of the vehicle?

A I just answered that. I don't remember if I asked her or she stepped out on her own.

Q What's your customary procedure when you make a traffic stop? Do you ask the person to come out or leave them in the car?

A It just depends. I don't do the same thing every single time. If somebody steps out on their own, I leave them out.

Q Didn't you order her out of the car?

A I don't recall if she had stepped out on her own or I asked her to step out of the car.

Q And why — But when she gets out of the car, where do you have a discussion with her?

A We're out of the car towards the back of her vehicle on the driver's side.

Q And you gave her back her license at that point?

A Yes, I gave her back all her documents.

Q Your testimony is it's at that point that you wrote a tailgating ticket?

A Following too closely. Wasn't a ticket. It was a warning.

Q You wrote it at that point?

A At my car.

Q Certain you wrote it at that point or you wrote it later at the substation?

A I wrote it at my car when I went back and ran her license.

Q Certain of that?

A Yes.

Q Didn't write it later?

A No.

Q Had you given her the ticket at that point, as well?

A Folded up her registration and the citation and handed it back to her and that's when I asked her for consent.

Q After you gave her the citation and the registration, the license, does she go back to her car?

A No. We were standing in the same place.

Q So, she just stands there and doesn't attempt to go back to her car?

A As soon as I handed her the stuff, I immediately started talking about the consent. I handed her her documents back and I said also as part of our routine — and then we went into what I already explained.

Q So, after you gave her back these items, you continued to talk to her as part of that traffic stop; is that correct?

A I gave her back her documents.

Q You never told her at that point she was free to leave and get back in her car and drive off, did you?

A I didn't have to

Q I'm asking you the question. You never told her at that point you had completed your traffic stop and she was free to leave and get back in her car?

A There was no need for that.

Q My question is — the third time — you never told her —

A No, I didn't.

Q — that you had completed your traffic stop, she was free to leave and go and get back in her car?

A I never verbally told her that.

Q Nothing you verbally told her, to leave, she could have left at that point as opposed to have to stay there and listen to you?

A She could have walked away freely all day long.

Q You never told her that?

A I didn't have to. She was free to leave.

Q You were assuming she knew?

A I said, here are your documents. If she would have said, thank you very much, and walked away, she was free to go. She didn't have to stand there and listen to what I had to say. She was free to leave.

Q How long did you give her to stand there before you started talking to her?

A It was almost immediately.

Q Now, what did you say to her after you gave her her documents back?

A I told her as part of our duties as deputy sheriffs, we routinely ask for permission — consent search to search vehicles that are travelling on the highway.

Q Now, based on your experience in the interdiction unit, you explain to people they were free to leave and they

had no obligation to talk to you when you stopped those person; is that correct?

A No, that's not correct.

Q You never told those persons that they had no obligation to talk to you?

A As part of our routine stop or contact with someone, when I was working in the the airports, our primary conversation would be the same thing what I just basically told you. We routinely contact an individual to ask for consent — cooperation of the travelling public, ask for consent of their luggage and of right to refuse. That was it. Oh, but you have the right to leave anytime you want, that wasn't part of the conversation.

Q Those people, you didn't order over like her?

A I didn't order her over either.

Q All right. So then, what do you say to her? You tell her it's a problem with drugs on 27?

A I believe I told her that U.S. 27 is used for — to transit-ship for drugs, something along those lines, we routinely as for consent permission to search people's vehicles.

Q You told her routinely you ask for permission?

A That's right.

Q Is that true, do you routinely ask everybody you stop for a ticket to search their vehicle?

A Not everybody, no, sir.

Q Do you routinely do it?

A Sure, I've done it plenty of times.

Q How many times have you done it when you worked out in that zone?

A I say 10, 12 times.

Q Why do you find it inherently part of your duties as a law enforcement officer making a traffic stop with no other basis to ask people to search their vehicles?

A 'Cause that's what I'm sworn to do.

Q Where was Officer Fortunato at the time that you were having this conversation with Miss McLeod?

A He was standing with us, same proximity where we were.

Q Where was the passenger of the vehicle?

A Still sitting in the car at the time, I believe.

Q He hadn't been ordered out of the car at that time?

A Nobody was ordered out of the car at all.

Q He wasn't sitting on a guardrail at that point?

A We put them on the guardrail after the dog alerted on the bag.

Q Where was the dog when you were asking her for consent?

A Deputy Fortunato's car.

Q He wasn't standing with Deputy Fortunato at the time you were asking for consent?

A No.

Q After you asked for consent, she doesn't say anything, does she, at that point, at that first point?

A No. When I asked her — when I explained to her and asked her for the consent, I believe she asked me, what are you looking for.

Q She responded with a question, what are you looking for? What do you say?

A I told her what we were looking for. She said, I don't have any of that in my car. I said, would it be okay if I looked. She said, go ahead

Q Up to that point, did you tell her she could leave and drive away and the traffic stop was over?

A No, sir.

Q She tells you she doesn't have any drugs in the car. You ask her if you can look again?

A After she — The question back to me was — seemed to me she didn't understand what I said. So, I explained it to her again.

Q How do you know she didn't understand?

A The way it appeared, what are you looking for, like along that line.

Q She said, what are you looking for, like what are you trying to find?

A No. I explained to her the first time. She said, what are you looking for, like maybe she didn't hear me or misunderstood.

Q You're thinking she didn't even understand you?

A I explained to her again, reiterated what I said and she said, go ahead and look. So, we did.

Q How many times have you testified in court to those words, go ahead and look, on these searches?

A Depends on what they say. If they say go ahead and look, I testify to it. If they say it's okay to look, I testify to that. If they say you may look, I testify to that.

Q You said she said, go ahead and look?

A I believe so, yes, sir.

Q So, you recall her saying, go ahead and look?

A Best of my recollection, yes, sir.

Q Ever made a statement inconsistent with that in response to that question?

A Excuse me?

Q Have you ever made a statement inconsistent with what you've testified to in court as to the response she gave?

A To the best of my recollection, no, I'm sure I have. Depends on how long it's been — how long the case has been delayed and how my memory serves me.

Q You're sure you have. Do you believe you have made inconsistent statements?

A If you're going to impeach me with something I said in the depo, it's possible, sure. It's possible that the exact words I don't remember.

Q I'd like to show you Page 36, Line 19 of your deposition taken on January 24, 1991 and ask you to take a look at that.

A What line?

Q I believe Line 26, the last four, five lines preceding that.

A Okay. I asked her if she had any drugs in the car. She said no. I asked, can we search your car? She said yes.

Q The testimony in that deposition is that she said yes; is that correct?

A That's what I said at the deposition, yes, sir.

Q Then you told the Court today that she said, go ahead and look; is that correct?

A I'm telling you she gave us verbal consent.

Q Is that your testimony today, she said, go ahead and look?

A She gave us a verbal okay to search her car

Q Have you ever made another inconsistent statement as to the response she gave you when you asked her to search the car?

A She gave us a verbal affirmative answer to search her vehicle.

Q Have you ever made an inconsistent statement to what you testified to in court today, which is, yeah, go ahead and look?

A I don't remember.

Q Let me show you the police report, Page 4, at the fifth or sixth line down.

A Okay.

Q Have you had a chance to look at that?

A Yeah.

Q Is that a report you prepared?

A Yeah, says go ahead and search.

Q Do you recall your response in the police report, go ahead and search if you want to; is that correct?

A That's what I wrote, yes, sir.

Q Based on your experience in the interdiction unit, you're aware that her response to your question is a very important response, isn't it?

A As long as it's an affirmative answer, sir.

Q You've testified in a lot of motions to suppress; haven't you"

A Yes, I have.

Q You're aware when you go out and do these investigations that her response is a very important response to put in a report and recall; is that right?

A On the day it happened, you have my police report. I have in quotes she said go ahead and search.

Q Yet, you've given three different statements.

A Six months later at a depo, if I said she said yes and today I'm saying she said go ahead, I don't feel there's much difference. She gave an affirmative answer to search her vehicle.

Q If we did this a year from now, she would say something different?

A No. To the best of my recollection, she said go ahead.

Q Yet, you've given three different answers to what she told you?

A No. I gave the same answer.

Q Those are not three different answers?

A It was an affirmative answer to the consent to search the vehicle.

Q Up until the point you had asked her to search, you had no other reason to believe she had been doing anything wrong; is that correct?

A That's correct.

Q Did you ever have any discussions with about asking to search her purse?

A Not that I could recall, no.

Q Did you ever ask for consent to search any concealed containers inside the vehicle?

A No.

Q Did you ever ask for consent to have the dog search the car or that you would ask for utilization of the dog to search the car?

A Just asked for consent to search the car. That was all.

Q Do you remember her not saying anything and just shrugging her shoulders when you asked her that?

A No, I don't.

Q Let me show you your deposition on Page 43 and ask you to look at Lines 7 through 12, and ask you if you recall making that statement?

A This is talking about Deputy Fortunato asking her to use the dog instead of me asking for consent, two different things.

Q This does not pertain to your questioning of consent?

A You're asking me — you asked me here, did you ask her if you could use the dog to search the car. I said I don't remember if Deputy Fortunato did or didn't. That's what this is about. According to the depo, he asked her. And when he asked her if it was okay to use the dog, I don't remember her response at that time.

Q Do you remember the question, she didn't respond positively about the dog?

Answer, she verbally consented to the search.

Question, I know what you're saying.

Answer, And then when he said, I don't remember if she said, yeah, that's fine or shrugged her shoulders or what. He just said, Ma'am, I'm going to use a drug dog.

Do you remember that?

A You're asking me if she shrugged when I asked for consent to search. My answer is no. That question in the depo is her response to Deputy Fortunato's using the dog after the consent was given.

Q Let's to to [sic] that at this point then. Do you remember Deputy Fortunato asking her to search the car again?

A No, I really don't remember at this time him asking her anything about the dog, but according to the depo—

Q Do you remember — you do not remember him, after you asked her for consent, asking her again for consent?

A No. I asked her for consent. He was standing there with us. She gave the okay to search the car. He went back and got the dog and brought the dog up. At that time, if he asked her if it was okay to use the dog or not, I don't recall right now.

Q Okay. Well, your deposition, which I just showed you on Page 41, provides an answer, I don't remember if she said yeah, that's fine or shrugged her shoulders or what. He just said, Ma'am, I'm going to use a drug dog.

In that deposition, you recalled that; is that correct?

A How long ago was the deposition? I'm telling you right now that I don't remember him saying that. At that time, I might have. I must have.

Q You remember the question, you don't remember what the response was in reference to utilization of a drug dog; your answer was no?

A Say that again.

Q Question was, you don't remember what the response was in reference to the utilization of a drug dog; your answer was no?

A You're asking me if she said - if we asked her about using a drug dog?

Q Yes.

A I already answered that.

Q Okay. So, after she allegedly tells you one of these things, what do you do, you go in the car?

A After the consent?

Q Yeah, or whatever it is.

A That's when Deputy Fortunato brought the dog up to the car.

Q And you don't go into the car; is that correct?

A Not till after he was through and done with the search and the drugs are removed. In the course of doing my tow slip and everything else I needed for the car, that's when I went in the car.

Q Now, the consent to search form, you had that in the police car at the time, didn't you?

A No.

Q Have you ever made a statement inconsistent with that?

A I don't normally carry consent to search forms in my police car.

Q Let me show you your deposition, Page 44, Lines 1 through 4 and ask you to take a look at that?

A Okay.

Q Have you had chance to read that?

A Yes.

Q Same deposition we're referring to. Remember the question, do you carry a consent to search form in your police car; your answer was yes. Do you recall that?

A No, but it's in writing, so I guess I must have said it.

Q You've had a chance to read it and this the deposition you gave?

A That's correct.

Q Can you tell me back on January 24th, 1991, you had consent to search forms in your car at that time and you tell me today, you don't?

A I have no idea. I could tell you I don't normally carry consent to search forms in my car.

Q You don't know why you'd make that response?

A No, sir. I have a basketful of report forms in my car.

Q I'm just asking why you have a totally different answer a few months ago.

A I have no explanation.

Q So, it's your recollection today that you did not have a consent to search form for her to contemporaneously execute?

A I got a verbal consent to search the vehicle. When we got back to the post *Miranda*, she signed the consent.

Q That's not my question.

A That's my answer.

Q My question is, did you have a consent to search form in your car contemporaneous for her to sign before you arrested her and told her she's facing trafficking charges?

A I don't believe I did.

Q Is it your testimony you did not see the dog inside the car?

A No. I saw the dog in the car.

Q Okay. And did you see how the purse got open?

A No, I did not.

Q Do you know if the cocaine was visible or not in the purse?

A No.

Q So, you wouldn't know whether the dog opened the purse on its own?

A I was still outside the vehicle with Miss McLeod.

Q Did you have any discussions with the passenger up until the time the cocaine was discovered?

A I don't believe so. I don't know if we did or not.

Q After the cocaine was discovered, did you have any further conversations with Miss McLeod at the scene?

A Other than she told me she was pregnant and I don't believe I even handcuffed or might have handcuffed her in the front. She said she had to go to the restroom real bad. Nothing pertaining to the incident, no.

Q She told you she had to go to the bathroom for basically the whole trip to the substation; is that correct?

A Yes, sir, but there's no bathrooms out there.

I tried to go as fast as I could, but there's no place to stop.

Q Did you have any discussions with the passenger of the car before you transported her?

A I don't remember if I did or not.

Q All right. Did she say anything to you enroute to the substation?

A I believe she was complaining about going to the restroom and complaining about the mosquitoes because there was plenty of them out there. A bunch of them had gotten in the car. We were all getting eaten up. Other than that, I don't remember.

Q When you get to the substation and you provide her with *Miranda* warnings, where is that in the substation?

A In the squad room.

Q Up until that point, had any female officer arrived?

A No.

Q And had you patted her down at that point?

A Just a basic outside pat but nothing —

Q Isn't it part of your procedure with the Sheriff's Office that a female officer come and pat a female down before she's taken into custody?

A If we feel it's necessary, yes.

Q Isn't that part of your procedure?

A If feel it's necessary, yes.

Q In this particular case, you just went ahead and patted her down and took custody of her yourself; is that correct?

A I did a peripheral pat and asked if she had any weapons, what have you. She said not. That was it.

Q At the substation when you read *Miranda* warnings, is she handcuffed at that time?

A I believe she might have been to the chair, yes.

Q Had she been given an opportunity to go to the bathroom at that point?

A Yes. First thing we did when we walked in the door.

Q After you advised her of her warnings — I assume you gave the warnings off the card?

A That's correct.

Q Did she respond after each one?

A Yes.

Q Did she ever indicate to you at that point that she wouldn't talk to you?

A No, sir.

Q She never said that?

A No, sir.

Q But when you asked her to provide a taped statement, she wouldn't provide a taped statement; is that correct?

A That's correct.

Q She wouldn't talk to you on tape, isn't that what she told you?

A That's correct.

Q You wanted to put *Miranda* on tape and memorialize those and take a statement of her?

A We don't usually — normally put *Miranda* back on the tape, but I would ask her if she was read her warnings previously and got a verbal answer.

Q She refused to provide a taped statement, refused to talk to you; is that correct?

A That's correct.

Q But then you continued to talk to her about substantial assistance at that point?

A No, we didn't discuss substantial assistance. What happened was — is that when I asked her for a taped statement, it was already after we had already had our discussions, would have been the last thing I would have done at that time. The taped statement would have been the last thing I would have done with her and transported her.

Q You didn't speak to her after she refused to give a taped statement?

A Not that I can remember about anything about the case. Might have been some other things about the car or whatever paperwork we were doing.

Q You were obviously interested in substantial assistance, in her cooperation 'cause you were trying to identify who the sources was and get that information, weren't you?

A I was interested in controlled delivery.

Q Right. And that's for the purposes of substantial assistance.

A No, that's not for the purposes of substantial assistance. I don't have that authority to give — to promote substantial assistance to somebody that's arrested in this situation.

Q Didn't you tell her the mandatory minimum sentence she was facing and the clause about substantial assistance in the substation and then explain to her how she could help herself out and you would help her out?

A I explained to her that we would interested in doing a controlled delivery and anything she did would be in her favor, yes, and I would come forward to assist her if she needed it.

Q Any assistance she provided to you would be in her favor?

A No, there was no guaranties or promises or what have you.

Q And in response to that, you had a discussion with her about how much she was getting paid or — and where it was coming — getting paid and where it was coming from

A That was before that. I don't know where she got it or going to go until she told me. Once she told me where she was going, that's when I brought up the idea of controlled delivery.

Q Did you also tell her you were going to arrest the passenger if she wouldn't tell you what his involvement was?

A She exhonerated him from the very beginning. By the time we got into conversation with the tape, I think he was already gone. We let him go.

Q Did you ever explain to her if she cooperated, there would be provisions that could assist her in her sentencing?

A I explained to her — I didn't make her any promises, like I already stated, no promises, no guarantees. Just interested in doing a controlled delivery and I would pass that information along to the proper people.

Q Let me show you your deposition on Pages 62 and 63, and ask you to read those and ask you if you recall those questions and answers in regard to that question?

A Which lines?

Q Bottom half of 63 and Page 63.

A Same thing we just went through yes, sir. Just went through.

Q Have you had a chance to read it? Do you remember the question, you explained to her that there was a substantial assistance program; answer, I don't believe I said substantial assistance. Question, but there was a way she could get a reduction? Answer, there are provisions the State offers if she wanted to assist in the investigation, something might have been able to have been done for her in exchange.

Did you explain that to her before Officer McCann spoke with her? I honestly don't remember. Question, wasn't it a purpose for him to speak to her to determine the source? Answer, he was trying to and he was also trying to find out who the receiver was.

So, Officer McCann comes in when you're having these conversations; correct?

A I believe he met us at the substation, yes.

Q Also, McCann was brought in for the purpose of substantial assistance?

A Lt. McCann, he was my supervisor. He came in as supervisors do. They have to do certain things when we make arrests, also.

Q Didn't you all sit down with her and try to get her to cooperate at that point? He was brought in and you all sat with her and talked to her about cooperating?

A He was already there, number one. Number two, after she told me that she was muling ths [sic] stuff for somebody, I made the recommendation to her we could do a

controlled delivery, I would do everything possible on my end to help her out.

Q It's your recollection these conversations weren't off the record, is that what you're saying, and they weren't to try to reduce her sentence for her?

A I have no power to reduce her sentence.

Q When did you ask her to sign this consent to search form that's been put into evidence?

A At the substation.

Q At what point?

A I don't really recall because Deputy Fortunato filled that out. That's his handwriting.

Q Did you see her sign it?

A Yes, I witnessed it on the second line.

Q Did you just put it in front of her? You didn't read it to her line by line, did you?

A You have to ask Deputy Fortunato.

Q Did you see him read it to her line by line?

A Did I see him read it to her?

Q Yeah.

A I don't remember him reading it to her, no.

Q You were there when she signed it?

A We were all at the same table in the squad room doing paperwork.

Q You don't remember him reading it to her?

A Verbally, no.

Q Do you remember what he said when he gave it to her?

A No, I don't.

MR. ENTIN: I have no other questions.

THE COURT: Redirect.

MR. GEISLER: With the Court's permission, Your Honor, I'd like to re-open direct for one specific issue regarding contents of the purse after the cocaine was found in the purse.

THE COURT: I don't care.

FURTHER DIRECT EXAMINATION

BY MR. GEISLER:

Q Deputy, after the purse was retrieved from the dog, were you present?

A After it was taken out of the car?

Q Yes.

A Yes.

Q Did you have an opportunity to look inside the purse after it was removed from the car?

A Subsequently, yes, I did.

Q Where did you first see the contents of the purse after it was removed from the car?

A I believe we were back at my vehicle when Deputy Fortunato had the stuff and showed it to me.

Q Was the contents of the purse — other than the cocaine, was the contents of the purse removed in your presence?

A I don't think it was removed at all at that time.

Q Did you ever see what was inside the purse?

A Subsequently, I did, yes.

Q What wsa [sic] in the purse?

A Some make-up and change and there was some bullets in there, that type of stuff. I think there was a checkbook. I'm not sure.

Q Did you ever see any identification on the checkbook, and name on the checkbook.

A It was Miss McLeod's name on the checkbook.

Q Anything else, to your recollection, the contents of the purse?

A No, sir.

MR. GEISLER: That's all I have, Your Honor.

FURTHER CROSS-EXAMINATION

BY MR. ENTIN:

Q One question. When you went up to effect the traffic stop, did you see her purse?

A At the time when I first stopped her?

Q Yeah.

A No, sir.

Q Now, when you make a stop, I assume you look out for the protection of yourself when you go up to a vehicle?

A That's corrct [sic].

Q Did you look in the vehicle?

A I was watching the subject's hands, yes, sir.

Q You never saw whether she had — there was a purse there that was open or closed?

A I didn't notice at that time, no, sir.

Q So, there's nothing to cause you to ask her to search the car other than the fact you just wanted to ask her; is that correct, no suspicious activity?

A Just like I explained in deposition, it was the inconsistent stories of where they were. That was all.

MR. ENTIN: Thank you.

MR. GEISLER: Nothing further of this witness.

THE COURT: Thank you.

(Whereupon, the witness was excused)

CERTIFICATE

"I hereby certify that the foregoing, Pages 1 to and including 56, is a true and correct transcription of my stenographic notes of proceedings which came on for Motion to Suppress before the Honorable STANTON S. KAPLAN, Presiding Judge, at the Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 1st day of August, 1991, commencing at 4:00 p.m.

In witness whereof I have hereunto affixed my hand this 7th day of September, 1991."

_____

Court Reporter

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA

STATE OF FLORIDA

CASE NO. 90-22943CF10A

vs.

Fort Lauderdale, Florida

JANICE McLEOD, June 26, 1992

Defendant. 9:30 a.m.

APPEARANCES:

OFFICE OF THE STATE ATTORNEY by DALE GEISLER, ESQ. of counsel and S. CARL GADDIS, appearing on behalf of the State.

MICHAEL JAMES ENTIN, ESQ., appearing on behalf of the Defendant.

The above-styled cause came on for Motion to Suppress before the Honorable STANTON S. KAPLAN, Presiding Judge, at the Broward County Courthouse, Fort Lauderdale, Broward County, Florida on the 26th day of June, 1992, commencing at 9:30 o'clock A.M.

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Thereupon:

The following proceedings were had:

THE CLERK: Janice McLeod.

THE COURT: You want make a preliminary statement to sort of bring things up to speed?

MR. GEISLER: Your Honor, this is a continuation of a Motion to Suppress. The original officer on the scene, Deputy Steven Robino, testified before Your Honor August 21, 1991, during the first part of the Motion to Suppress. We're now here on the second part of the Motion to Suppress, where the backup officer is going to testify on behalf of the State.

In a nutshell, the State has shown so far the defendant was traveling northbound on U.S. 27, she was stopped for following too closely, according to the first officer, and then a consent was — according to him, was given to search the car. That resulted in a dog alerting to a purse inside the car that had a kilogram of cocaine.

Subsequently, at the police station, she signed a written Consent to Search. She was issued a warning, a citation —

a warning, in essence, and both those documents are in the Court file from the first hearing.

THE COURT: Warning?

MR. GEISLER: A warning for following too closely, not a ticket but a warning.

If I may, Your Honor, present on behalf of the State, S. Carl Gaddis, a certified intern, who will be doing the questioning.

MR. ENTIN: If I may just also add a few factors, Officer Robino's testimony was about an hour and a half. I would suggest the Court would need —

THE COURT: It's typed up, I see.

MR. ENTIN: I would suggest the court at some time would have to read this.

THE COURT: I will.

MR. ENTIN: I did an 18-page memorandum, which is in the Court file, which was filed over a year ago as well. Just so the Court's aware, the actual issues that I allege — one, I alleged that the stop is pretextual and ulterior reasons to stop the car and search the car. The other one would be the detention of the defendant. Third is the consent, whether it was voluntary or coerced, and also there's a Motion to Suppress the statements that were made post-arrest, which need to be resolved at this hearing as well.

THE COURT: Okay. I'll listen to the rest of the testimony and read the transcript of Robino's testimony and I will read all your cases and memos and listen to final argument and I'll make a decision.

MR. ENTIN: Could I just ask that you defer finalargument maybe till next week so you could read that, so I could at least argue to you after you had the benefit of Robino's testimony?

THE COURT: That's okay.

MR. ENTIN: Next week will be fine. Just 15 minutes, 10, 15 minutes.

THE COURT: Mr. Entin never — You've already been over five already just to tell me what happened.

Go ahead, call your next witness.

MR. ENTIN: I have a witness here. I don't know if we need to invoke the Rule.

THE COURT: I thought it was the officer.

MR. ENTIN: I have a defense witness.

MR. GEISLER: I don't care.

THE COURT: Your next witness is the Officer?

MR. GEISLER: That's correct.

MR. GADDIS: State calls Deputy Pete Fortunato.

Thereupon:

DEPUTY PETE FORTUNATO, was called as a witness on behalf of the State, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION:

BY MR. GADDIS:

Q Would you state your name, for the record, please?

A Peter Fortunato, Junior.

Q By whom are you employed?

A Broward County Sheriff's Office.

Q What are your duties and responsibilities with the Broward County Sheriff's Office?

A Presently, I'm assigned to District One road patrol, Carver Rances.

Q Do you patrol in a marked unit?

A That's right.

Q In uniform?

A Right.

Q Were you so employed on November 7, 1990?

A Yes, I was.

Q On that date, did you have occasion to come in contact with a person known to you as Janice McLeod?

A Yes, I did.

Q Is she in the courtroom today?

A Yes, she is.

Q Would you point her out for the Court, please?

A Sitting right there with the white outfit on.

MR. GADDIS: May the record reflect the witness has identified the defendant, Janice McLeod?

THE COURT: Yes.

Q What caused you to come in contact with the defendant?

A I was on U.S. 27. At that time, I was Deputy Sheriff dog handler. I was on U.S. 27, little bit north of 84, playing with my dog, giving him a break, in the median strip. Deputy Robino had pulled up and we were talking for a few minutes while I was playing with my dog, playing fetch. At that time, a tractor trailer drove by and right behind it, very close proximity was two-door vehicle.

Q Approximately how close was the vehicle you observed to the tractor trailer?

A About two car lengths or little bit less.

Q Can you describe the vehicle?

A Two-door champagne-color, had dark, tinted windows.

Q How fast was this vehicle going?

A I don't know.

Q Do you remember what time of day this happened?

A About 5 P.M.

Q At that point, what, if anything, did Deputy Robino do?

A Deputy Robino said, look how close that car is behind that tractor trailer, and I said, yeah, and he said, I'm going to go stop it. I said, go ahead. I put the dog up in the car and I followed him.

Q Did Deputy Robin ask you to back him up?

A No, he didn't.

Q Do you often back up traffic stops?

A Yes, I did. In my two and a half years in K-9, the main function of the K-9 patrol is to support services, to support other units, backups, mostly reactive stuff.

Q When you backed up Deputy Robino, were you in a marked unit?

A Yes, I was.

Q Also in uniform?

A Correct.

Q Do you recall what direction you were going on U.S. 27 when you followed the defendant?

A Northbound.

Q Do you recall how far you went before the defendant stopped?

A Well, the traffic stop was effective about four miles north of 84 and U.S. 27.

Q When you stopped, do you remember where your vehicle was in relationship to the defendant's vehicle?

A I believe it was to the right of Deputy Robino's vehicle. I believe they pulled over — they did pull over in the right-hand side. It was pretty good size shoulder.

Q What happened then after you stopped? What happened next?

A Deputy Robino approached the driver's side. I approached the passenger's side of the vehicle. He obtained the driver's license and vehicle information from the driver, which is Janice McLeod.

Q Did you speak with the defendant?

A At that time, no.

Q Did you speak with — was there a passenger in the car?

A Yes, there was.

Q Did you speak with the passenger at that point?

A I believe I did.

Q What, if anything, did you say to the passenger?

A I believe I asked him to step out of the vehicle.

Q Did he step out?

A Yes, he did.

Q Did you ask him any questions?

A Couple minutes later I did, yes, sir.

Q Do you recall what questions you asked him?

A Yes, sir. I tried to just make general conversation with him. I asked him, where you going? He said, going to Belle Glade. I said, where are you coming from? He said, Swap Shop in Fort Lauderdale.

Q Did you observe what Deputy Robino was doing while you were speaking with the passenger?

A I believe he was completing a warning citation.

Q What did you do at that point after speaking with the passenger?

A At that point, I walked back to Deputy Robino and I told him — I said, the defendant — or the passenger advised me he was just coming back from the Swap Shop in Fort Lauderdale. Deputy Robino told me that the driver said she was just coming back from Miami, going to Belle Glade.

Q Did you discuss with Deputy Robino the possibility of conducting a search?

A At that point, no.

Q At what point, if at any point, did you ask Miss McLeod for consent to search the vehicle?

A Deputy Robino made that decision. I was there merely as a backup.

Q Do you recall if the defendant consented to have the search done?

A Yes, I do.

Q Do you remember specifically what she said?

A Vaguely, yes.

Q Would you tell the Court?

A She said — she replied in the positive to go ahead and search the vehicle, something to that effect.

THE COURT: Do you remember the words Deputy Robino said?

THE WITNESS: Yes, Your Honor. He asked her for consent to search the vehicle for narcotics or weapons. He told her she has a right to refuse the search. She said, go ahead, search if you want, or something to that effect.

Q What happened at that point?

A At that point, both the passenger and driver stepped to the side and to the rear of their vehicle, about 20, 30 feet or so. I pulled my dog out of the car, put him on a leash, of course, walked around to the right rear of the car.

I conducted a search counterclockwise or clockwise, started at the right rear and upon reaching the right front passenger door, the dog jumped inside. I opened the door, he went inside the vehicle, immediately grabbed a black purse, which was on the console, and started chewing it up.

Q Was the purse open or closed?

A It was closed.

THE COURT: So, this happened after there was a consent to search?

THE WITNESS: Yes, your Honor.

Q The dog alerted on the purse. Did the dog bring the purse back to you?

A Yes, he did. I had to pull it out of his mouth

Q Did you open the purse?

A Yes, I did.

Q Did you find anything inside of it?

A Yes, I did.

Q What was inside the purse?

A It was what I believe to be a kilo of cocaine, commonly packaged that way in street sales.

Q Did you remove the cocaine from the purse?

A I unzippered it, yes, sir, and I pulled it out just a little bit.

Q Was there anything else in the purse?

A There was some personal articles and there was checkbook with Janice McLeod's name and home address on there.

Q Do you recall if the defendant said that the purse belonged to her?

A Yes, I do. She said it did belong to her.

Q At that point, what did you do with the purse?

A I gave it to Deputy Robino.

Q What did he do with it?

A He held on to it. I continued my search of the vehicle. The dog didn't alert anywhere else in the vehicle. I put the dog away. The passenger and driver were taken into custody by Deputy Robino.

Q Did you or Deputy Robino advise the defendant of her *Miranda* rights?

A Deputy Robino did upon reaching the substation.

Q Do you recall how he did it, whether it was orally?

A It was card he pulled out of his pocket and read to her verbatim.

Q Do you recall if she replied that she understood her rights?

A Yes, she did.

MR. ENTIN: Object to the leading nature of this question, ultimate issue.

Q Do you recall her response?

A Yes, I do.

Q And her response was what?

A She understood her rights.

THE COURT: This was at the substation?

THE WITNESS: Yes, Your Honor.

THE COURT: Off the card?

THE WITNESS: Correct.

Q Did the defendant make any other post-arrest statements?

A Yes, she did.

Q In those statements, did she refer to the cocaine?

A Yes, she did.

Q Did she refer to what she was doing with cocaine?

A Yes.

Q And specifically, could you tell us what she said?

A She said she's transporting the narcotics to Belle Glade for a thousand dollars for somebody and that the passenger had no idea what was going on.

Q Did you give the defendant a Consent to Search form?

A When we reached the office, yes, sir.

Q At the substation?

A Correct.

Q Did you read her that form?

A Yes, I did.

Q Did she read the form?

A Yes, she did.

Q Did she sign the form?

A Yes, she did.

Q At the substation?

A Correct.

Q Did you witness the form?

A Yes, I did.

THE COURT: I believe that form's already in evidence. We don't have it here today. Oh, we do have it? You found it.

Q eputy Fortunato, approximately how many searches have you and the K-9 conducted?

A Around 500, 400 searches, thereabouts.

MR. GADDIS: I have no further questions, Your Honor.

MR. GEISLER: Just one second.

Q Deputy Fortunato, I'm showing you a State's Exhibit. Could you identify this exhibit, please?

A That's the Consent to Search form that was written in my handwriting.

Q Is that your signature at the bottom?

A Witnessed by me.

MR. GEISLER: Thank you.

Q Do you recognize the defendant's signature on that form?

A Yes, I do.

Q Was that signed in your presence?

A Yes, it was.

MR. GADDIS: Nothing further, Your Honor.

CROSS-EXAMINATION

BY MR. ENTIN:

Q Deputy Fortunato, you're in the K-9 unit; is that correct?

A I was previously.

Q You're not at this time?

A That's correct.

Q All right. And the dog, Pouch, is that the dog assigned to you?

A Pouchin, yes, sir.

Q When did you take possession — start working with that dog as a BSO deputy?

A I really don't remember. Almost three years ago.

Q About March of 1990?

A February, I believe I took him. I picked him up at the airport.

Q February '90?

A I believe so.

Q So maybe around March of 1990?

A Sounds about right.

Q And did you continue to control that dog for the year following that at least?

A Yes, sir.

Q Now, on November 7 of 1990, the information you testified to, that took place approximately — almost two years ago; is that correct:

A Correct.

Q Did you prepare your own police report?

A Yes, I did.

Q Do you have that with you today?

A No, I don't.

Q When is the last time you reviewed that police report?

A When I wrote it.

Q Almost two years ago?

A That's correct.

Q You didn't read it before your deposition either?

A No, sir. It can't be found. I don't know where it's at.

Q Have you ever provided that to Mr. Gisler?

A No, sir.

Q Is it customary for you to testify without reading your police reports or refreshing your recollection with them?

A No, it's not.

Q So you're testifying today just basically on your memory; is that correct?

A And the other report, yes, sir. My report can't be found.

Q You did write the other report; Officer Robino wrote that?

A That's correct.

Q You participated in tens or hundreds of arrests since November 7 of 1990; isn't that correct?

A Yes, sir.

Q Now, you indicated you were on U.S. 27 that day. What was your purpose for being out there?

A Just driving around. It was slow that day so I went out west.

Q Why do you pick out west to just hang out?

A 'Cause that was my District. I like to go look at the fishing holes and talk to the people on 27. Also a lot of car burglaries that occur during the daytime. People park their trucks, go out fishing.

Q So it's your position that you randomly happened to be on U.S. 27 at the time Miss McLeod was stopped?

A Yes, sir, that's correct.

Q Officer Robino, you're aware, was previously in the drug interdiction unit, are you aware of that?

A No.

Q It was not a plan that you and he were out on U.S. 27?

A I don't believe so, no.

Q Now, isn't it fair to say that U.S. 27 is an area that's fairly well focused by the Sheriff's Office for narcotics interdiction?

A I don't know what the procedure is now, but when I was a deputy out there, no.

Q No?

A That's correct.

Q How about Alligator Alley and 84, the area — the street that runs across there where she was stopped?

A At what timeframe?

Q Back in November of '90?

A No, sir.

Q All right. Did you keep logs as to all the detections and use that the dog had between March of '90 and March of '91?

A Yes, I did.

Q Okay. Do you remember me providing you with those copies at the deposition I took of you?

A Yes, I do.

MR. ENTIN: Can I approach the witness and show him the copies?

Q I'd like to show you what's Defense Exhibit A and ask you to take a look at that and tell me whether or not those are copies that I gave you or depict what's in your logs?

A Yes, sir.

Q Okay. That's from March of '90 up until basically the end of '90; is that correct?

A Till January 17 of '91.

Q Okay. And for the purpose of educating the Court, would it be fair to say every time that the dog is used for the

purpose of detection of drugs, you would mark that in that log?

A Yes, sir, in a non-training atmosphere.

Q So even if the dog was utilized, nothing was found, you would still not that; is that correct?

A That's correct.

Q Now, if you look at those logs, it appears that, just estimating, there's between 65 and 70 entries between March '90 and January of '91. Would that be approximately fair to say? I think about 10 on a page?

A I can count them.

Q I've highlighted in yellow, if you could take a look at those, the ones that occurred on U.S. 27, or 84, Alligator Alley, the crossing area.

A You highlighted the one on the Turnpike, too.

Q Ignore that. The other ones, too. The ones on U.S. 27; is that correct?

A Yes, sir.

Q There's ones on Alligator Alley and 84?

A Yes, sir.

Q Okay. And if you can count those, would it be fair to say that in excess of 25 — up to maybe 30 of the times that you used the dog were in the area of U.S. 27 and Alligator Alley?

A There's 25.

Q About 25 times?

A Yes, sir.

Q Okay. And there's how many pages there? And 10 entries on a page; is that right?

A Seven pages. About 70 entries.

Q Just one that has two less. So, assuming there's 68 entries on that, is it still your testimony that you just randomly stay on 27 or is it an area that you target and use the dog approximately one — third of that year to interdict narcotics?

A No, sir. Each one of these cases is separate. If you'd like, I'll go through a couple of them just to show you what the situation is, circumstances.

This first page here, 3/3 of '90, I was asked to respond to assist another K-9 handler. U.S. Customs had people stopped. Three kilos of drugs found there.

On 4/28 of '90, I was also requested to respond.

On 5/17 of '90, Department of Transportation called me and I searched a semi tractor trailer, as per their request.

5/15, the Highway Patrol called me and I responded. Also on 5/15 of '90, that same day, Highway Patrol. This was AOA to Highway Patrol.

Q On many of those, you were just out in the area?

A I'm explaining to you. Not on many of them. A good many of them I was called out to assist Highway Patrol or their agencies.

Q Nevertheless, approximately a third of those entries are on U.S. 27, near Alligator Alley?

A Yes, that's correct.

Q Now, going back to November 7 of 1990, you specifically recall where you were on 27 when you first observed Miss McLeod's vehicle?

A Yes, sir, I do.

Q Where was that?

A I was on the median strip north of 84, on U.S. 27, giving my dog a break.

Q You were in the median?

A Yes, sir.

Q And the dog was out of the car?

A That's correct.

Q Officer Robino was out or inside the car, if you recall?

A He was outside the car, as well.

Q Okay. Did you observe Miss McLeod's vehicle initially and identify any traffic problems or did he do that?

A I believe he did.

Q Did he say anything to you at the time?

A He said, look how close that car is to the tractor, or whatever he said, and I looked and I said, yeah. He said, I'm going to go stop him, and I said, go ahead, and I put the dog in the car and I told him —

Q You didn't have any discussions with him in the median to the effect that you would make some random stops and determine if they were carrying contraband?

A I don't believe so.

THE COURT: What do you mean, you don't believe so? Have you ever done that?

THE WITNESS: No sir.

Q Then you get to view the car that Miss McLeod's in; is that correct?

A Yes, sir, that's correct.

Q And that car is stopped how many miles from where you first observe it?

A About three miles, I guess, thereabouts.

Q Okay. And I believe you testified on direct you couldn't recall how many car lengths her car was back from the tractor?

A Between one and two car lengths is what I advised initially.

Q So, after he told you he saw this happen, you looked over to see the vehicle?

A Yes, sir.

Q The car that Miss McLeod was in, was there anything unusual about the car that drew anything to your attention that it would be used for drugs?

A No.

Q Did the car have tinted windows?

A Yes, it did.

Q On the back, as well?

A Yes, sir.

Q Now, when the vehicle was stopped, Officer Robino did the primary investigation and detention and questioning of Miss McLeod; is that correct?

A Correct.

Q And you were there as backup?

A That's right.

Q And when you went to the passenger side of the vehicle that the passenger was in, did you ask him to get out of the car?

A Yes, I did.

Q For what reason?

A For my own safety.

Q Do you customarily ask passengers to get out of the vehicle on routine traffic stops?

A Yes, I do, absolutely.

Q He wasn't doing anything wrong; is that correct?

A Not that I could see, no.

Q Do you order him out at gunpoint?

A No. I asked him to get out of the vehicle.

Q When he gets out of the vehicle, you just say — you have casual talk; is that correct?

A Correct.

Q You're not questioning him to try to find out if there's anything that would cause you to believe he had drugs in the vehicle?

A No.

Q You weren't target questioning for that area?

A No, I wasn't.

Q So, you asked him where he came from. That wouldn't be important to determine if you want to search the vehicle or not?

A That's correct.

Q Okay. And he told you he had come from the Swap Meet in Fort Lauderdale?

A Yes, sir.

Q You found that particularly important because there was a discrepancy about that, wasn't there?

A Yes, sir.

Q That's the reason the vehicle was searched, because he said he had been coming from Fort Lauderdale, she said they had come from Miami?

A No, that's not true. Deputy Robino made the decision to ask to search the vehicle. It wasn't my decision.

Q You related to him that he had told you he had come from the Swap Meet in Fort Lauderdale; is that correct?

A That's correct.

Q She had indicated she had come from the Swap Meet in Miami?

A No. She said she came from somebody's house in Miami.

Q So, there was a discrepancy and that was something you related to Officer Robino?

A Correct.

Q Have you ever made a statement inconsistent with the statement that he had told you he had come from the Swap Meet in Fort Lauderdale?

A I don't think so.

Q Okay. I want to show you your deposition, Page 40, Lines 22 through the end on the following page, and ask you to review that.

A I said he was coming from the Swap Meet in Miami.

Q Can you read that, and if you read the next few lines on the next page?

A From the Swap Shop in Miami to Belle Glade. That's correct. That's my answer.

Q So, you've had a chance to read the deposition I took of you wherein I asked you, what did he tell you; answer, he was coming from the Swap Meet in Miami and going to Belle Glade. My question, from the Swap Meet in Miami into Belle Glade; answer, that's correct.

Do you recall making that statement in the deposition?

A Yes, sir.

Q Okay. That statement in the deposition says he was coming from Miami, not Fort Lauderdale?

A Correct.

Q Can you tell me why today in court you're testifying that you clearly remember that he told you he was coming

from Fort Lauderdale, when in the deposition, you clearly, unequivocally say he's coming from Miami?

A In deposition, I made a mistake. I wasn't able to view my deposition until you showed me. I did review the report and it refreshed my memory that, in fact, he did say he came from Fort Lauderdale.

Q You told me you haven't seen the report since the date of the arrest, if I can finish the question. You told me that you haven't reviewed the report since the date of the arrest just several minutes ago.

A My report, yes, sir.

Q And you told me you couldn't locate it; is that correct?

A Yes, sir.

Q So, how did you review your report to correct your testimony?

A I reviewed Deputy Robino's report. That's what I just said.

Q At the time of this deposition, you also reviewed Deputy Robino's report earlier. I gave you an opportunity to read it. Do you recall that?

A Yes, sir.

Q But yet, nevertheless, when I asked you twice the same question, you verify unequivocally that he said he was coming from Miami instead of saying obviously, I made a mistake because I read the report just before the deposition. You couldn't independently recall without reading another officer's report?

A I guess not, no, sir, not at that time. But I'm stating right now he told me he came form Fort Lauderdale Swap Shop.

Q Okay. Now you testified today that Miss McLeod said — When you asked if you could search the car with the dog, what did she say?

A Something to the effect, yeah, go ahead and search, or yes. She responded in the positive.

Q Did she say go ahead and search, is that your recollection?

A Something to that effect. I don't remember exactly what she said, but she responded positive, to go ahead and search the vehicle.

Q Did she respond verbally, she say something?

A I believe so, yes, sir.

Q Based on your experience, would find it important to remember what she said when the ultimate issue of whether you search the car or not is in question?

A Deputy Robino's report reflects exactly what she said quotations, exactly what she said. I have no personal recollection of that day exactly what she said and I can't quote what she said that day. I do recall that she said we do have permission to search the vehicle for narcotics and weapons.

Q You recall her saying that or recall her mannerisms leading you to believe that's what she thought would be okay?

A No, sir. She advised that we were able to search the vehicle.

Q And that the dog could go in the vehicle

A I didn't say the dog.

Q Didn't you ask if the dog could go in the vehicle?

A No, sir. Deputy Robino did.

Q Did you hear him ask that question:

A I really don't recall.

Q I'd like to show you your deposition, bottom of page 42, top of 43, and ask you to refresh your recollection.

A What am I looking at?

Q The last four or five lines of 42 and first three or four, five lines of 43.

A Do you want me to read it out loud?

Q Just read it to yourself and ask you to refresh your recollection of what you recall saying in deposition.

A Okay.

Q Do you remember me asking you on the bottom of 42, which you just had an opportunity to read, did you hear him say or advise anything, he was going to bring the dog; yes. What did she say? Positive response, she still didn't refuse. I don't know her exact words, but her mannerisms and circumstances, just that she agreed to have the dog come in. Did she say she agreed? Answer, I tell you, I really don't know exactly what she said, but there was no objection. Do you recall what she said; no. Do you recall if she said anything; no, I don't.

Do you recall making those questions and answers in deposition?

A Yes, sir.

Q Can you tell me why in deposition you can't tell me what she says and that she has mannerisms that cause you to speculate that she agreed, but then today, you're telling me you recall her saying that she would agree to the search?

A She did agree to the search, and you asked me what did she say specifically and I said I don't remember. She did indicate —

Q No. I asked you, question, do you recall if she said anything —

MR. GEISLER: Objection, argumentative.

MR. ENTIN: I'm not arguing with him, just repeating the question —

MR. GEISLER: He should have an opportunity to answer the question as posed. I don't think he was finished.

THE COURT: Were you finished?

THE WITNESS: No, I wasn't.

THE COURT: Go ahead.

A As I indicated, she didn't respond that we weren't able to search. She responded, yes, we were able to search the vehicle. There wasn't no nod of the head. There was a verbal response, as well as her physical response was indicating that we did have permission to search the vehicle, indicating to me that she understood what was going to happen.

Q You remember that clearly today?

A Well, yes, sir, looking at my deposition and reviewing the report.

Q I asked you if you recall she said anything. You said, no, I don't, in the deposition.

A That's what I said then.

Q All right. And do you recall whether Officer Robino had possession of her driver's license at the time he asked her to search the vehicle?

A I really don't remember. I believe he gave it back to her.

Q You recall that or you just don't know?

A I think so, yes, sir.

Q And did anyone tell her after, in your presence — after her license, if it was given back to her, and the ticket,

if it was written, that she was free to leave at that point and go, or did someone say that the traffic stop was over?

A I don't recall, sir.

Q When she was asked to consent to the search, was she on the passenger side of the vehicle or the driver's side?

A I don't remember.

Q Were you standing next to her?

A I was in close proximity.

Q You said the passenger was on the guardrail; is that correct?

A I didn't say that.

Q Was he on the guardrail?

A I think so.

Q You were near him; right?

A I was in close proximity to Deputy Robino and the defendant. I don't exactly remember where I was, but I was right there with him.

Q Did she have any hesitation about the search or ask questions about what was happening?

A Not that I could recall, no, sir.

Q After the cocaine was found, was she questioned at the scene?

A I don't believe she was. As far as what?

Q Was she questioned at the scene about anything incriminating?

A She was asked if the purse belonged to her.

Q That was at the scene or was that at the station when you were in the room?

A That was at the scene, as well as at the station.

Q She said that at the scene, as well?

A Yes, sir.

Q But her rights were never read to her until she was at the station?

A That is correct.

Q What was the conversation that took place at the scene to cause her to tell you she was transporting it for a thousand dollars?

A That took place at the office.

Q What did she say at the scene about the cocaine?

A I really don't remember.

Q You said she made incriminating statements at the scene. Do you know what they are?

A I just told you what she said. She was asked if the purse belonged to her. She said yes. That's incriminating.

Q Who asked her that?

A I don't remember.

Q You don't remember if it was you or another officer?

A No, sir.

Q But her rights were not read to her after the purse was confiscated and she was questioned if it was her purse?

A At that point, no.

Q Did you know if there was cocaine in her purse when you asked her if it was her purse?

A It appeared to be cocaine. It wasn't field tested at that time.

Q But to the best of your knowledge, no one read her her rights at the scene; is that correct?

A Correct, yes, sir.

Q And she wasn't free to leave after you found the purse with the contents; is that correct?

A That's correct.

Q She say anything else at the scene?

A Not that I could recall.

Q Now, when you went to the police station, you called in Officer — or Officer McCann was called in — Lt. McCann?

A Yes, sir.

Q You were only there for part of the discussions and meetings that took place at the police station; is that correct?

A Yes, sir.

Q Were you ever present when Lt. McCann and Officer Robino were speaking with her?

A I don't remember. I do remember Lt. McCann coming in, but I really don't remember Lt. McCann talking to her.

Q In your presence, did you have any discussions — were there discussions with Officer Robino and the defendant or Officer Robino and yourself surrounding her continuing to deliver the cocaine and provide you information?

A I don't remember.

Q You remember any discussions about substantial assistance?

A No, sir.

Q You remember if Lt. McCann was called in because there was an issue of her performing substantial assistance?

A I really don't know.

Q Who read her her rights?

A Deputy Robino did.

Q Do you remember whether he tried to take a taped statement from her?

A No, sir, I don't know.

Q And when he read her her rights, did she have any discussions about her rights?

A As far as what?

Q Did she question or have any questions about what her Constitutional rights were?

A No, sir.

Q She did not?

A I don't believe so, no.

Q So she just acknowledged her rights and didn't question it; is that right?

A That's correct.

Q You ever made a statement inconsistent with that?

A Not that I can recall, no.

Q I show you [sic] your deposition, page 48, lines 12 through 17.

A Okay.

Q I'll give you a chance to review that.

A Yes, sir.

Q Remember me asking you, did she have any discussions about her rights, and your answer was, I don't know? Remember saying that in deposition?

A Yes, sir.

Q Today you're telling me that she understood her rights and didn't say anything?

A And I said, not that I know of.

Q This one, though, you said, I don't know?

A Same thing.

Q To you, it's the same?

A To me, it's the same.

MR. GEISLER: Objection, argumentative.

THE COURT: Overruled.

Q Who prepared the Consent to Search form? Is that your handwriting or Office Robino's?

A My handwriting.

Q Did you fill that in after she signed it?

A No.

Q You're sure of that?

A Yes, sir.

Q Did you ever give her a *Miranda* form to fill out?

A I didn't, no, sir.

Q Was there any discussion about having her fill out a Consent to Search form at the time she's asked to search, before she's arrested at the scene?

A No, sir.

Q Do you have one in your car normally?

MR. GEISLER: Objection as to what's normal.

Q Did you have one in your car that day?

A I don't remember.

Q You don't know?

A No, sir. There have been times I looked for my Consent to Search forms and they were gone. Occasionally, you run out.

MR. ENTIN: I have no other questions.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. GADDIS:

Q Deputy, you talked about ownership of the purse at the scene on cross and also on direct examination.

A Yes, sir.

Q How did that conversation take place? Who initiated the conversation regarding ownership and what was said in your presence?

A Something to the effect that when I pulled the purse out, Deputy Robino looked over and said, whose purse is this, and I believe the defendant acknowledged it being her purse.

Q Any other questions regarding the purse at that time at the scene?

A No, sir.

MR. GADDIS: Okay. Thank you.

MR. ENTIN: No other questions.

THE COURT: Thank you.

(Whereupon, the witness was excused)

THE COURT: Any other witnesses from the State?

MR. GEISLER: Not from the State.

MR. ENTIN: I have a defense witness.

Thereupon:

GODFREY SOLOMON, was called as a witness on behalf of the Defendant, and being first duly sworn, was examined and testified as follows:

MR. ENTIN: Before we start, I just want to apprise the Court that he has identified himself as the passenger in the vehicle. I'm not his attorney and he has voluntarily come forward and agreed to testify, and I don't

want to have any ethical problems with myself being his attorney.

THE COURT: He hasn't been charged with anything, has he?

MR. ENTIN: He was not charged, but I don't know respective —

THE COURT: You have any intention of charging him?

MR. GEISLER: I don't know what he's going to say. I'm not granting him immunity to testify.

MR. ENTIN: He wasn't arrested and speedy trial may have run.

MR. GEISLER: No, he wasn't.

MR. ENTIN: He was taken down to the police station in cuffs.

MR. GEISLER: He wasn't arrested. Well, ask him.

THE WITNESS: No, I wasn't. I was not.

MR. ENTIN: You were not arrested?

THE WITNESS: No.

THE COURT: What Mr. Entin's getting at, you have not been charged with this offense, even though you were in the car, and at this point, they don't have any intention of persuing [sic] charges against you; however, if you testify here and you say something that gives them cause to believe that you were involved in the possession of these drugs that were found, they may file charges against you at a later time.

So what Mr. Entin is saying is that you should be advised of and it's your choice as to whether you wish to testify or whether you wish to speak to an attorney first before you testify to see if you should invoke any privileges or rights against testifying.

You understand what I mean?

THE WITNESS: Yes, sir. I'm willing to testify.

THE COURT: You're willing to testify now without going to see a lawyer?

THE WITNESS: Yes, sir, 'cause I'm just going to tell what happened, just the truth.

THE COURT: How old are you, sir?

THE WITNESS: 21

THE COURT: Do you work?

THE WITNESS: Yes sir.

THE COURT: What do you so?

THE WITNESS: Drive a forklift. I work for Pine Grove back in Belle Glade.

THE COURT: Did you finish high school?

THE WITNESS: Yes, sir.

THE COURT: Okay.

MR. ENTIN: He's indicated to me he denies any knowledge of knowing what was in the purse.

THE COURT: I understand that. Otherwise you wouldn't be calling him.

MR. ENTIN: Exactly, but in an abundance of caution.

THE COURT: He says he doesn't want a lawyer.

As long as you're sure of that. You're sure of that now?

THE WITNESS: Yes.

THE COURT: Would you have money to hire a lawyer, if you wanted one?

THE WITNESS: No, sir.

THE COURT: If I appointed one for you, would want to talk to one?

THE WITNESS: Yes, sir.

THE COURT: You would?

THE WITNESS: If that's the case. If that's the procedure, but I'm just — I'm just here to tell what happened that day.

THE COURT: I understand that, but I mean, is it that you don't want a lawyer because you can't afford to talk to one to get some advice or if you were afforded a lawyer to talk to you, would you take that opportunity if it didn't cost you anything?

THE WITNESS: The reason I said I don't really need a lawyer because, to my point of view, I know I'm clear, to my honesty and my knowledge.

THE COURT: I understand that, but I'm just telling you that if you — if you feel that you would like to talk to a lawyer before you testify to see what your rights are, and you don't have the money to afford one, I could get a lawyer to speak to you and give you some advice, if you wanted to. That's up to you. If you don't want it, that's fine. If you do want it, that's fine, but it's your choice.

THE WITNESS: I'll just go ahead and testify.

DIRECT EXAMINATION

BY MR. ENTIN:

Q Would you state your name, please?

A Godfrey Solomon.

Q Where do you live?

A I live in Belle Glade.

Q And what is your address, sir?

A 78 Baton Drive, Okeechobee Center.

Q And how old are you?

A 21.

Q The Judge already questioned you. You had graduated high school; is that correct?

A Yes, sir.

Q Have you gone to college at all?

A No, sir.

Q Have you ever been arrested or convicted of any crime?

Q No, sir.

Q What do you do for a living?

A I drive a forklift for Pine Groves. It's a season job.

Q And how do you know Janice McLeod?

A Her husband is like a godfather to me, you know. He look out for me and stuff.

Q You've known her and him a long time?

A Yes, sir.

Q Okay. For the record, do you see her in court today?

A Do I see her in court?

Q Janice.

A Yes, sir, right there.

MR. ENTIN: I ask the record to reflect no question, that he's identifying Miss McLeod as the person he knows as her.

THE COURT: Right.

Q All right. Back in November of 1990, do you recall the police stopping the vehicle that you were in?

A Yes, sir.

Q Okay. On that day, can you tell the Court where you started traveling from?

A I was traveling from the flea market back to where I stay there in Belle Glade.

Q How did you get — Did you start your travel at Belle Glade that day?

A Yes, sir.

Q You recall about what time you left?

A Was about — sometime between 11 and 12.

Q Okay. And why were you traveling from Belle Glade to Miami?

A I was taking back a tape recorder I had bought Sunday from the flea market, but it wasn't working.

Q You had been to the flea market earlier that week?

A Yes, sir.

Q Is that customary that you would go to the flea market in Miami when you live in Belle Glade?

A Yes, sir, 'cause that's where you — if you need something good, something good and cheap, not expensive, that's where you go.

Q Okay. All right. So, you had bought a tape recorder and wanted to return it; is that correct?

A Yes, sir, 'cause it wasn't working.

Q Did you have a vehicle of your own at that time?

A No, sir.

Q Okay. What discussions did you have with Miss McLeod on that day about returning a tape recorder?

A I go over to her house sometime and when I went over there, I heard she was saying she going to Miami. I don't

know for what, but she said she was going over there. She was telling somebody, so I asked —

Q Could you speak a little slower?

A I asked her if I could go over there to return a tape recorder if she don't mind. She said that's all right, so I ride with her over there.

Q All right. So, you were the passenger down to Miami?

A Yes, sir.

Q She was the driver?

A Yes, sir.

Q Did she ever tell you why she was going to Miami?

A No, sir.

Q Then what happens when you get Miami on that day?

A She drop me off at the flea market and she tell me how long I gonna take. I tell her not long. She say she come back and pick me up.

Q How long were you at the flea market before she returns?

A I would say about hour, hour and half.

I don't really remember, but I was — I got m — They didn't suit me to what I want, so they gave me my money back, so I went outside, wait on her till she came.

Q You returned the tape recorder, got your money back?

A Yes, sir.

Q Was there a location you were meeting her?

A In the front. I told her I be outside. If she came before me, just to wait outside.

Q All right. Did she ever come and pick up?

A Yes, sir.

Q Where did you go after she picked up?

A We went home. We head back home.

Q What road did you go on?

A We came back on — what it was — 183rd and headed back on 27, the normal way we drive — come over there.

Q Came up 27?

A Yes, sir.

Q North on 27?

A Yes, sir

Q Okay. Now, do you remember seeing any policemen in the roadway on that day?

A Yes sir.

Q Was there anything unusual about Miss McLeod's driving before she was stopped?

A No, sir.

Q Do you remember seeing a semi tractor trailer truck?

A Yes, sir.

Q Why do you remember that?

A 'cause at the time when the — we were passing the police officer, he was on the left side of the road. I believe it was two cars — yeah, it was two cars and the trailer was — the trailer was speeding. Right, the trailer was speeding past and it was going around us while we was approaching the police officer on the left, the left — hand side. And when the trailer pass, 'cause I said to her, they gonna pull this trailer, look how he speeding. Same time, the trailer pull up 'cause he saw the cop. We came like this when we were passing.

Q She can't take down this. You mean you were next to the trailer?

A We were side and side passing the police officers on the side of the road. So, I said — What did I say? I said, they gonna pull this truck. It was speeding. The truck kept on going, so I said, okay. Then the truck passed in front of us, switch back in front of us in the lane and kept on going.

Q Did Miss McLeod ever get very close to the truck, behind him?

A No, not — The truck came from behind us and passed us.

Q Okay. So, she was never in the same lane as the truck?

A No, sir. Only time she came in the same lane is when the truck came in front of us, when we pass after and it just kept on going.

Q All right. Was she ever within 50 feet of the truck in front of her?

A At what time?

Q At any time when she was in the same lane as the tractor trailer truck.

A No, sir.

Q Was she ever closer than 50 feet from the vehicle?

A No, sir.

Q What happens then?

A The car — the truck kept going and we just there, you know. Look at how that truck speeding and stuff. He was there playing. We sit there.

Then suddenly I saw this car — the police car came up on the side — came up on the side of us and did something like this. I said to her, what he saying? She said, he said to pull

over. I said, for what? He said to pull over, so she pull over on the side of the road, so one came in front. So I look behind me like this. One behind, too. One came to the front, one was at the back. I was sitting in the car. One of the officers came on this side of the road.

Q Which side?

A One of the cops came on my door and the other one came on her door. The cop that came on my —

Q Did you see the officer here today?

A Yeah, he was around the back. I think he came up on the stand.

Q Was he the one that came on your side?

A Yeah, he came on my side.

Q Another officer?

A Either one was with the dog or something like that 'cause he the one that came with the dark tinted car. Okay. He came on my side. He opened the door. He just open the door the and he said, would you step out for me, please. So I stepped out. I didn't know what was up.

He said, step out. I said, what's up, Officer? He is, well, we just doing — he said something about some check. So I said, what you stop us for? He said, we narcotics, something like that, he said. He's narcotics, so he checking. You all ain't got nothing in the car? I said, what you talking about? I was still puzzled, you know. I didn't know what it was.

Q Did you ever know there was narcotics in the car until he found it?

A No, sir. So I kept asking, what you talking about? He still did not say what he was saying. He didn't make his self clear to me. He kept saying, you have anything in the car? I said, what you talking about?

Then he kept — he said — he took me around to the back. He kept walking with me, put — No, he searched me first, touched me on my clothes and stuff, feel me up and stuff. He said, do you have an identification? I said, no. I ain't got no pocket in my jeans. I didn't take my wallet with me. He put his arm around my shoulder, took me around the back. Sure ain't got nothing in the car? I said, I wish you tell me what you talking about.

I was getting irritated for what he kept saying that. He said, you want to make a deal with me? I said, what you talking about, man? Same time, he took the other officer, walk around with Janice. We were both standing together. Said, you all ain't got no stuff in the car bringing from Miami? I said, man, be for real. I don't know what you talking about, man. He said, can I search the car then? I said, that's that lady car, you got to ask her. He kept asking her, can I search the car? She said, what you want to search my car for, what you stop me for?

Q Did he ever ask you where you were coming back from?

A Yeah, I tell him coming from U.S. flea market.

Q In Miami?

A Yeah, I tell him I'm going home.

Q Did you ever tell him were coming from the Swap Shop in Fort Lauderdale?

A I didn't mention nothing about no Swap Shop.

Q Okay. So, what happens then? Do you hear him ask her?

A When I looked at him, I say that's not my car, you got to ask her. He turn to her and say, can I search the car? She kept asking, why you want to search my car, what you want to search my car for? He said, we just — you know, we just narcotics agents. We can get what we want to search a car if you don't let us. So he says — she said, well, you got

to tell me what you want to search my car for, what you stop me for.

By the time — I know the other officer was there talking to us, you know, you can make a deal. When I hear he said — the other officer said, wow, I got a big one, I turn around like this. I said — you know, he said, yeah, I got the big one. I like, what are you talking about? I still puzzled.

He said, yeah, and he came up to us, turn your arm around, don't move, don't move, talking all sort of stuff. I was still puzzled. What wrong with this, man? Turn around, turn around. Under arrest for trafficking narcotics. I said what? I don't know what you talking about. What narcotics? So I saw what he was testing something.

Then afterwards, he said, you sure you ain't got nothing — he turn to her, you sure you ain't got no more in the car? I don't remember what she said. She said something to him, said, no, I ain't got nothing. She said, I ain't got nothing in the car, so that's the time I started — he came up with the dog and dog kept barking 'cause I can remember that. That's the time I remember, that dog kept barking. So he took the dog in the car.

Q Do you remember if the dog went in the car before the narcotics were found?

A No. The dog — I ain't seen no dog at that time.

Q Okay. Did you ever hear Miss McLeod agree to the search of the car at any time?

A No. She was still talking to the other officer when I just saw him popped out, I got the big one, I got the big one. I was still puzzled. I didn't know what he was talking about when he said that.

Q Did you see him go in the car?

A Yeah.

Q The officer?

A No. I was turned to the side like that. I see when he coming out 'cause he start talking when he was coming out. Right. He start talking before he even got his hand out of the car 'cause he said, I got the big one. Then he lift out the hand. I saw the pocketbook. I thought, what are you talking about? He said he got the big one. Then he brought the thing up to us, bring it up close to the car, you all under arrest, put the handcuff and stuff like that. I saw the white thing. At that time, they kept testing. I said, oh, Lord. Then that's the time, you know —

Q So, the dog never went in the car?

A No. He put us back on the railing, on the road to sit down. That's the time I saw the dog. I remember that dog kept barking. He took the dog in the car.

Q Okay. Now you came out about a year ago?

A Yes, sir.

Q I talked to you one time about this?

A Yes, sir.

Q Other than today, have I ever talked to you about this again?

A No, sir.

Q Okay.

MR. ENTIN: I have no other questions.

CROSS-EXAMINATION

BY MR. GEISLER:

Q Mr. Solomon, on the week of November 7, 1990, you were in Miami earlier that week; is that correct?

A Sunday, yes, sir.

Q And then you wanted to go back and exchange your items or work out a deal with whoever you dealt with in Miami?

A Yes, sir.

Q Is that right?

Now, how is it agreed that you were going to go back to Miami with Miss McLeod. Did you suggest going to Miami or did she tell you she was going to Miami? Which came first?

A What came — Rephrase the question again, sir.

Q How is it decided you were going to go to Miami the second time that week?

A I didn't know I was going to go. I wasn't even thinking of going that time until I get a ride to go. I have papers for my tape, so whatever time I go didn't really matter. When I went over there, I heard she was telling somebody, look I was going to Miami and come back. So I said, yeah, I want to take my tape recorder over there, can I catch a ride.

Q You heard from her she was going to Miami November 7 and you asked for a ride?

A Yeah.

Q How long did it take to get from Belle Glade to Miami that day, November 7, about?

A About — I would say roughly about hour and a half or hour, 40 minutes.

Q You went down U.S. 27?

A Yes, sir.

Q And she dropped you off at the flea market?

A Yes, sir.

Q And then there was a lapse where you have no idea what she did until she picked you up again?

A No, sir.

Q You have no idea where she went?

A No.

Q Did you notice her purse on the way down to Miami that day? Did you notice her purse, the black purse — did you notice her black purse in the car on the way from Belle Glade to Miami?

A Sir, forgetting the color, I didn't know what color the purse was. I tell you the truth, I didn't know what color the purse was.

Q Did you ever see the purse that day?

A Yeah, when the officer took it out. I still don't remember what color the purse is. I know he took her purse out.

Q Forget the color. The purse?

A The purse.

Q When is the first time you saw the purse that day?

A I put it like this — I'm going to put it like this — Can I just put the question how I want to put it? All right. A normal thing to me, a person purse or wallet is like a pen in your hand. You see the thing every day, you don't take notice of it.

Q When is the first time you saw Miss McLeod's purse on November 7, 1990?

THE COURT: What he's trying to tell you, he doesn't really know. He probably saw it, but can't register.

I think what Mr. Geisler wants to know is, when is the first time that you saw the purse?

Q When you saw the purse the first time, you know it, when it was taken out of the car?

A That wasn't the first time I saw it. That's the first time I noticed the purse.

Q Exactly. The first time you noticed it that day?

A Yeah.

Q How big was the purse? Did it look like it had a lot of things in it or did it look empty?

MR. ENTIN: I object to relevancy. I don't know if he's fishing to try to get him in trouble.

MR. GEISLER: I'm not trying to get him in trouble.

THE COURT: Overruled.

Q As far as the size of the purse, the first time you specifically remember seeing it is when it was taken out of the car going northbound on 27?

A Yes, sir.

Q Do you remember the size of the purse that day?

A No, sir.

Q You didn't notice any discrepancy between — throughout that day, the size of the purse changing?

A No, sir. I tell the truth, I was so tired of saying to myself, what this I got myself into, or what trouble, I ain't even got time to notice about that.

Q Okay. Now explain — You lost — you lost me on the tractor trailer and your car going northbound on 27.

A Oh.

Q You said — Which lane was your car in as you went by the two police officers when you were going northbound on 27 before the stop?

A The car was in the — our car was in the right lane.

Q Extreme right lane?

A Right lane. It's two-lane going down so it must be right lane.

Q Okay. Where was the tractor trailer as your car went past the two parked police officers?

A Where our car was?

Q No. Where was the tractor trailer?

A Right beside us.

Q In the left lane?

A We was in the right. The other truck — The truck was in the left.

Q When you went past the police officer?

A No, sir. We pass like this 'cause he was trying to slow up because he was speeding. He was going around us. When he saw the officer on the side of the road, he try to slow down, so when we were passing, we pass like this. So when he already past now, where we pass, if he got — Okay. So he just went on ahead.

Q So when did you first see the police officers, before or after you passed them?

A I saw them before we passed them and when we passed them.

Q You could see through a tractor trailer truck to the police officers?

A Yes, sir. The truck is like this and car is like this, so I can see straight across, straight across.

Q Were you concerned that you saw two police officers on the road?

A No, 'cause we wasn't speeding. We wasn't speeding. That's the first thing I do, I look over there at what the meter say, to see if she was speeding. But the truck — I was already laughing at the truck 'cause I know it going to get pulled because —

Q What was the speed of your car when you looked over?

A It was about 55, 56, if I remember.

Q What's the speed limit there?

A 55.

Q So, you looked — when you first saw the police officers, you also looked through a tractor trailer and almost at the same time looked —

A I didn't look through a tractor trailer. I looked over the tractor trailer. The load wasn't on it, so you can see straight across.

Q Then there came a time when the truck got in the same lane as your car?

A Not my car.

Q Well, the car you were a passenger in?

A Yes, sir.

Q How long after you passed the police that were parked on the median did that truck then change lanes to go in your lane?

A Could you rephrase the question again?

Q Yeah. The truck — the tractor trailer was in the left lane as you went past the police?

A Yes, sir.

Q When they were parked; correct?

A Yes, sir.

Q So you're still going northbound, both going exactly the speed limit?

A I don't know what he doing, but I know we were passing, so I assume he was doing the same thing, same speed.

Q How far did you have to go before the truck then goes in your lane, past the police?

A The police was — the cops was right here. The truck driver, I guess, he say to his self that he was clear, then

he went down, go in front of us an go ahead. I can't judge it. I can't put it in yards or meter or mile, whatever. All I know, he drove beside us for awhile, then go in front of us and go on.

Q So then the police pull you over?

A Yes, sir.

Q The officer that just testified, that you just saw in court —

A Yes, sir.

Q — is that the officer that pulled you over?

A No, sir.

Q Did you ever see the other police officer who pulled you over?

A Last time I came to court.

Q Last time we had this motion, but you didn't get to testify, that day?

A Yes, sir.

Q It's not a trick question. We were here a long time ago and you were also here?

A Yes, sir.

Q Another police officer testified a long time ago when you were here?

A Yes, sir.

Q Another police officer testified a long time ago when you were here?

A That's the one, the officer talking to Janice.

Q Right, exactly. That's the police officer who pulled you over?

A Yes, sir.

Q Now the police officer who was here today came to your side of — the passenger side?

A Yes, sir.

Q Asked you to get out?

A Yes, sir.

Q And you did?

A Yes, sir.

Q Now, did he pull a gun or anything at that time?

A No, sir.

Q On direct examination — Let me rephrase it.

When Mr. Entin was talking to you, you gave a statement that Deputy Fortunato was just — the police officer here — said to you, do you want to make a deal with me; is that correct?

A Yes, that's what he said, yeah.

Q What did that mean to you?

A I'm puzzled. I didn't know what he was talking about. I didn't know what this man — I said to him, be for real. What you talking about? That's what I said to him.

Q Was that statement made before or after the purse was taken out of the car?

A That was before.

Q How did the purse come out of the car in your presence?

A Officer took it out.

Q The one who was just here?

A Yes, sir.

Q Officer Fortunato?

A Yes, sir.

Q Did you see the purse actually come from the car — out of the car?

A Yes, sir.

Q How did it happen?

A When he said he got the big one, I see he taking out the purse, out of th ecar like this.

Q Where was the dog when he said that?

A The dog was in the car. I didn't see the dog at that time.

Q The police car?

A That's where the dog came out of .

Q At that time, was the dog still in the police car?

A Yes, sir.

Q Did you see the dog at that time?

A No.

Q Did you know a dog even existed?

A I know.

Q At that time?

A I know black car like that carry a dog.

Q

No.

A I think the dog was barking. I can't remember. I think the dog was barking in the car or something.

Q All right. And you were present when any conversation took place between not the officer you were dealing with, but the other police officer and Miss McLeod?

A Yes, sir.

Q How far wer you from Miss McLeod during this after both of you came out of the car, about how far?

A Come as close as you can to this lady and I'll tell you.

Q Okay?

A That was it.

Q Between the Court Reporter and me, that's how close you were?

A Yes, sir.

Q Maybe two feet?

A I can't judge it in feet.

Q Very close?

A Yeah.

Q Could you hear everything she said?

A Yes, sir.

Q Everything, to your knowledge?

A Yes, sir.

Q What did Miss McLeod say after you were already out of the car?

A You got to be specific. Said about what? Lot of things was said.

Q Tell me everything she said outside the car in your presence.

A Okay. She said to the officer, why you want to search my car, what I did, what you pull me over for? He kept saying, this is narcotics, we just checking.

Q Who said that, the officer you were dealing with?

A The other officer. They was — This is when they were talking, when we together, the both of them kept saying — talking together. They talking together when they talk. One talking, one stop talking, one talk, that's the way they were doing it.

Q What did you hear Miss McLeod say?

A She say, why you want to search my car, why you pull me over? He kept saying he was just searching, you all ain't got no — nothing , you all ain't got nothing in the car?

Q That was before the purse was taken out of the car?

A Yes, sir.

Q What else did she say?

A He said, I can get — I can get what I need to search the car, so it would be best if you let me go ahead and search it. She said, no, you can't tell me why you want to search my car, I ain't did nothing wrong, you ain't telling me what you pulled me over for. If you want to be like that, I can get proof for — I can get — he was telling me get something or other to search the car. I even know this. I was looking at him talking, the officer. I heard when the officer said, I got the big one, I got the big one, then he said, you all under arrest, turn around.

Q So, you never — What else did you hear after that from Miss McLeod, after those statements were made by the police officers?

A And we are handcuffed, put the cuff on.

Q Did you hear Miss McLeod make any —

A You all ain't got nothing else in the car? I was shut up 'cause I was mad now. I shut up now. I said, I ain't saying nothing more.

Q Did you hear Miss McLeod speak?

A You got anything else in the car? She said no. That was it.

Q That was the last you heard of any statements by Miss McLeod?

A Yeah.

Q You never heard her say it was okay to search her car?

A No, I did not hear that, sir.

Q Okay. After that, then were you taken down to the police station or at least a substation?

A Yes, sir.

Q Did you go in the same car as Miss McLeod?

A Yes, sir.

Q And when you arrived at the substation, were you in the same room as Miss McLeod?

A No, they put me in the front room and took her somewhere around the back.

Q So, you have no idea —

A First, she sit down over there, over to the side. They put us down at the end of the table and then they put me up at the top and took her out and bring her around the back.

Q Did you observe — did you see Miss McLeod sign any papers?

A No, sir.

Q Are you aware of any papers that Miss McLeod may have signed that day?

A No, sir.

Q Did you ever see Miss McLeod give any documents to the police officers before you were taken down to the substation when you were first pulled over?

A Her license. He came to the window and asked for license and registration.

Q Did you see Miss McLeod produce those items?

A Yup.

Q Did she hand them to the police officer in your presence?

A Yes, sir.

Q Do you know what happened to those documents?

A No, sir.

Q Did you ever see Miss McLeod receive any document at the side of the road that day?

A No, sir.

Q Were you within — earlier you said within two feet, one to two feet of Miss McLeod from the time you were taken out of the car until you were taken to the substation?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q And you never saw here receive any documents from any police officers at the scene?

A No, sir.

Q Okay. Driver's license, registration?

MR. ENTIN: Asked and answered three times. I object.

THE COURT: Overruled.

MR. GEISLER: No more questions.

THE COURT: Anything else?

MR. ENTIN: I have no more questions.

THE COURT: Thank you, sir. You can step down.

(Whereupon, the witness was excused.)

CERTIFICATE

"I hereby certify that the foregoing, pages 57 to and including 130, is a true and correct transcription of my stenographic notes of proceedings had before the Honorable STANTON S. KAPLA N, presiding Judge, at the Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 26th day of June, 1992, commencing at 9:30 a.m.

In witness whereof I have hereunto affixed my hand this 16th day of March, 1993."

_____

Court Reporter

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA

STATE OF FLORIDA

CASE NO. 90-22943 CF

vs.

Fort Lauderdale, Florida

JANICE McLEOD, July 8, 1992

Defendant. 11:00 a.m.

APPEARANCES:

DALE GEISLER, ESQ., Assistant State Attorney, appearing on behalf of the State.

MICHAEL JAMES ENTIN, ESQ., appearing on behalf of the Defendant.

The above-styled cause came on for hearing before the Honorable STANTON S. KAPLAN, Presiding Judge, at the Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 8th day of July 1992, commencing at 11:00 a.m.

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Thereupon, the following proceedings were had:

MR. ENTIN: Continuing saga, Judge.

THE COURT: What stage were we?

MR. ENTIN: Judge, we left off, just to refresh your recollection, as you recall, several months ago you heard Officer Rabino. Last week you heard Officer Fortunato. There's Officer Godfrey (phonetic) and I want to put my client on.

THE COURT: Okay. Let her come up here.

Thereupon,

JANICE MCLEOD, having been first duly sworn, was examined and sworn upon her oath to testify as follows:

THE COURT: Okay.

MR. ENTIN: Shall I proceed?

THE COURT: Sure.

MR. ENTIN: Okay. Thank you, Judge.

DIRECT EXAMINATION

BY MR. ENTIN:

Q Janice, would you state your name, please.

A Janice Lenetta McLeod.

Q How old are you?

A Twenty-six.

Q How many children do you have?

A Four.

Q How far did you go in school?

A Eleventh grade.

Q Have you worked in the last year or two?

A Yes.

Q What type of work do you do?

A Work at South Bay Boars Packing House.

Q Back on November 7th of 1990, do you recall being arrested?

A Yes.

Q On that day, can you tell me shortly, before you were stopped, where were you traveling, which direction?

A North on 27th.

Q North on 27th?

A North on 75.

Q North on highway 75?

A Yes.

Q Broward County?

A Yes.

Q And how long had you been on 75 before you observed some officers?

A About — I was on it for about 30 minutes, about 30 minutes.

Q About 30 minutes?

A Yes.

Q And who was in the girl [sic] with you?

A Solomon.

Q Now, when you are traveling north on 75, shortly before you stopped, do you recall a truck in the immediate area?

A Yes.

Q Can you tell me what you recall about that truck?

A Well, as we was coming out on 27th, the truck was riding in the back of us at the time. But as we come out, the

police sitting on the side of the road, the truck was passing us.

I was riding in the right hand lane. The truck was riding in the left lane, and it was passing so I seen the two police cars coming. And I see one of them come on the side of me and the next one come to the back of me.

Q Let me just go back a minute. When you first see the police cars, the truck is in the left lane and you're in the right lane?

A Yes.

Q You heard the officer testify you were tailgating. Did you ever tailgate?

A No, sir.

Q Do you know what that means?

A Yes.

Q What does that mean?

A When you ride too close up on the vehicle.

Q And, in fact, you and the truck were in different lanes, correct?

A Yes.

Q Describe what your car looks like?

A It's a grayish looking Nissan Maxima.

Q It has dark tinted windows?

A Yes.

Q All the way around?

A Yes.

Q Anything else unusual other than it has tinted windows?

A Just tinted windows.

Q So then you see the officers. Is the K-9 unit on the highway or in the car —

A It was on the inside.

Q And then what happens when you pass the officers on the roadway?

A Well, I past them on the road, the truck past us. Then I see the police guy get in the car and they ride, come down on the road behind us.

The dog man was on the side of me and the next police car was in the back of me. The dog man tell me to go over on the side, to pull over, so I pull over off the road.

Q When you say dog man, you mean Officer Fortunato?

A Yes.

Q Pete Fortunato?

A Yes.

Q So he's next to you and the other officer's behind you?

A Yes.

Q What do you do?

A After he told me to pull over, direct me to go over, I pulled over on the side of the road.

Q What happens then?

A He asked Steven Rabino to come to the car on my side, asked me for my driver's license and registration. And I give it to him.

Q You had a license and registration?

A Yes.

Q Okay. After you hand it to him, what happens?

A He take it. And he go back to his car and I see Pete come on the side, on the passenger side of the car and was talking to Gulliver Solomon.

Q What happens then?

A I guess he take the license and go run it through the machine or whatever. But he come back to me and he asked me to step outside the car. I step out the car. Next minute we step out.

Q After you both are out of the car, what happens?

A Well, they told us to go on the side of the rail.

So Steven was asking me where we was coming from. So I told him we was coming from the flea market.

Q In Miami?

A Yes.

Q All right. What happens then?

A He asked me — say where I was coming from. Then he asked me can I search your car. And I asked what you want to search my car for. And he said, I'm stopping you because a lot of narcotics or something going around on the road, so I'm just asking you to get out and search your car.

THE COURT: What did he say? Say that again?

THE WITNESS: He said something about narcotics.

THE COURT: Narcotics.

Q He asked if he could search your car and then you asked him why do you want to search the car and what did he say?

A He said, "I just want to search your car because I feel like you're carrying narcotics."

So all he was askin' me again, can he search the car. I never asked him — I ask him why he want to search my car?

So at that time, I see Pete go around inside of my car on the passenger side and he going and get my bag.

Q Okay. Did you ever —

THE COURT: Wait a minute, I didn't understand that. He said what now?

Q Go back. Let's go back. The officer asked if he could search your car, is that correct?

A Yes.

Q And he asked if he could search your car because he was concerned about narcotics?

THE COURT: Not all that. What was that thing about the bag. She tells somebody —

MR. ENTIN: She testified, I believe, Your Honor, that while she was talking to Officer Rabino, the other officer went into the —

THE COURT: Rabino or Fortunato?

THE WITNESS: Fortunato.

MR. ENTIN: She was talking to Officer Rabino. Officer Fortunato on the passenger side, went in and got the bag out.

THE COURT: Okay.

Q Is that correct?

A Yes.

Q All right. Now, when Officer Fortunato was in the car, had you ever agreed to him at that point to let him go in your car?

A No. Steve was asking me, "can he go inside. Can he search the car?" I told him no. I said, "why do you want to search my car?"

He said, "I just feel like you're carrying narcotics."

Q Okay. What happens then?

A At the time, me and Steve, when we was at the back of the car, the rear part of the back part of the car.

Q At that point, had he ever given you back your license and registration?

A No.

Q Had they ever written you a tailgating citation?

A No.

Q When did you get the tailgating citation?

A At the substation.

Q When you got to the substation?

A Ah-huh.

Q Now, after Pete goes in and finds the bag, what happens?

A Well, when he went in the car, he take out the bag. He said, "we have a big one."

So at the time, I just dropped my head. And then he said, "turn around, you're under arrest." And at that time, they put handcuffs on us and we was sitting on the side rail.

So he asked me if anything else in the car that I should tell him about and I told him no. So then he get the dog out the car.

Q Had the dog ever gotten out of the car up until that point?

A No.

Q So the dog never searched the car until after you were arrested?

A No, sir.

Q What happens then after you're arrested?

A Well, when he get the dog, we was — he set us on the side while he get the dog.

He take the dog through the car. Dog never find nothing through the car. Open up the trunk of the car and dog still didn't find nothing.

Q All right. Now, after you arrested, did they read your rights at the scene?

A No.

Q Do you go to the police department?

A They kept me to the substation, some substation. I don't know.

Q What happens when you get to the substation?

A I was sitting down there and we sit there for about 10, 15 minutes.

Q Who's there?

A Some officer and Pete, Steve.

Q Pete Fortunato, Steve Rabino and Godfrey, and do you remember another officer coming in that you had not seen on the road?

A Uh-huh.

Q So there were three officers?

A It was several them at the front, but they kept me back in a room.

Q All right. And when you are in the room, what happens?

A This police guy was asking me if I could make a deal with him.

Q What did he ask you?

A If I could tell him where I was getting the stuff from. That he would help me out.

Q Which officer was asking you to help him out?

A I don't know his name, but there was one in the office with a camera.

Q It wasn't one of the two — Are you all right?

A The two of them.

Q The officers that were on the side of the road, Fortunato and Rabino, are they the officers that asked you to help them out or was it a third officer?

A There was three of them that asked me. One was on the side of the road. Steven and Pete tell us that if I could tell them where we get it from, they would let us go.

And then when I get to the station, the policeman came in the room and he asked me the same thing, too, and asked me it will help me out.

Q And when they wanted you to help them out, what did they want you to do?

A Tell them where I was getting it from.

Q What did they want you to do?

A They asked me if I could carry them to the place where I get it from.

Q They wanted you to deliver where it was going?

A Yes.

Q And did they tell you — Do you remember them telling you about it was a 15-year sentence you would be looking at?

A Yes, they told me I would be looking at 15 years if I didn't tell them where I was carrying it or where I get it from.

Q Okay. And now, you heard the officer testify that you told him you had gotten $1,000 to carry the package, is that correct?

A Yes. And how much I was getting paid for this.

Q Did that discussion take place while you were trying to work out — They wanted you to work a deal as you call it?

A Yes.

Q Did they tell you what your sentence would be if you cooperated with them?

A No, they didn't tell me.

Q Okay. And the piece of paper which was the form that you signed, where did you sign that piece of paper?

A At the substation.

Q Alright. And did you know what that was?

A Well, I asked them what was this about. They told me — they say we had already discovered it, just sign the paper. So I sign the paper. I didn't know what it was about.

Q Did you read it?

A No. They just told me to sign the paper.

Q Why didn't you read it?

A Because I asked them. I said what it was about. They give me the paper. I looked at the paper. They asked me — I said, "what this paper about?" He said, "we already gone over this. Here."

I read it at the scene, so I signed the paper and that was that. They asked me if I wanted a tape or something and I told them no.

Q They asked you if you would go on tape?

A Yes.

Q And speak on a tape recording?

A Yes.

Q And you told them you would not?

A I told him they already asked me everything already.

Q Was Godfrey — was he in the police station at that time?

A At the time they were asking me about the tape? No. They had — He came in the room — when I come out the room, he was gone.

Q Did you ever, at anytime, agree to let them search through your car?

A I never tell them they could search. He searched on his own.

MR. ENTIN: I have no further questions. One other question.

Q Have you ever been convicted of a crime anywhere in the world?

A No.

CROSS-EXAMINATION

BY MR. GEISLER:

Q Ms. McLeod, you came down to Miami, the Miami area, that day, right?

A Yes.

Q And you had Mr. Solomon with you?

A Yes.

Q How did it come about that Mr. Solomon was with you that day?

A Because he was at my house.

MR. ENTIN: Judge, I will object to any questions that go into as to how they got to Miami or why they were going to Miami.

The ultimate issue is whether or not she consented to the search. And to allow them to cross on things that go to knowledge and circumstances surrounding the actual possession of the cocaine is irrelevant to this. And as to why she went to Miami is irrelevant.

MR.GEISLER: Her credibility is an issue. And it's been brought out by witnesses in her presence why she was brought here and find out why it's not true with what the original witness said.

MR. ENTIN: Judge —

MR. GEISLER: Issue of credibility —

MR. ENTIN: If you get to Miami, then you get to the issue of she picked up cocaine and that's clearly —

THE COURT: I will sustain the objection.

MR. GEISLER: Okay.

Q You're traveling northbound on State Road 27?

A Yes.

Q You never tailgated a truck?

A No.

Q When was the first time you saw a truck?

A He was riding with use for quite awhile.

Q So the truck goes by you on the left?

A Yes.

THE COURT: Mr. Geisler, I will save you time. I will accept the fact that the stop was proper. The police say they saw tailgating, so I have no problem.

MR. GEISLER: Thank you, Your Honor.

Q You said Deputy Fortunato pulled you over, the second police officer that testified, I think, last week?

A The one that told me to pull over on the side was the dog man. That was Pete.

Q Okay. And when Deputy Fortunato asked to search for narcotics, you asked why?

A I asked him why. I asked him what it was at first, what was narcotic because I never know what it was.

Q You didn't know what narcotics were?

THE COURT: I thought — Didn't she say that Rabino —— Is she talking to Rabino?

MR. GEISLER: Judge, that's on direct. That's my question.

THE COURT: Which officer were you talking to? Who wanted to search your car, the one that was here last week or the one eight months ago?

THE WITNESS: The one that was here last week was the one who tell me to pull over.

THE COURT: Who asked you —

THE WITNESS: Steven Rabino asked me —

THE COURT: He was here months ago?

THE WITNESS: Yeah.

Q Okay. Not the dog —

A No. The dog man was the one that tell me to pull over

Q So you didn't say anything?

A I was asking him why he want to search the car.

Q Right. And he said for narcotics?

A For narcotics.

Q Okay. And then what did you say in response to that?

A I asked him, "what was narcotic?" And then he said, "drugs." Then I say, "drugs?" He said, "yes."

Then I said, "I don't know why you want to search my car. I didn't got no drugs in my car."

Q So you did say something in response to his request to search?

A Yes.

Q Correct me if I'm wrong, just a few minutes ago didn't you say you said nothing in response to that?

A What you mean?

Q When did you say no?

A No for what?

Q To the consent to search?

A At the time when he was asking me can he search my car.

Q Then you ultimately said no?

A I said no.

Q When did you get that warning ticket?

A At the substation.

Q Okay. Never when your paper work was handed back to you by the officer?

A He never gave me anything until the substation.

Q You never got —

A Driver's license and registration back at the substation and then he gave me a ticket, too.

Q Did anybody read your *Miranda* warnings to you?

A No.

Q Never?

A Never.

Q Do you know what the *Miranda* warnings are?

A Ah-huh.

Q The right to remain silent, the right to get an attorney?

A No.

Q No one ever said that to you?

A No.

Q At anytime from the time you were originally pulled over up until today, no ones ever advised you of your *Miranda* warnings in this case?

A I don't exactly remember.

Q Did anyone ever tell you that you don't have to consent to search your vehicle?

A No.

Q Let me show you State's Exhibit 2 in evidence and ask if you ever seen that before?

A So what is this?

Q That's my question to you. Have you ever seen that document before? You don't know?

A (Witness nods in the negative.)

Q Would you recognize your signature if you saw it?

A I know my signature, yes.

Q Okay. Is that your signature on State's Exhibit 2 in Evidence?

A Yes.

Q Okay. But you don't remember ever seeing this document, State's Exhibit 2 before?

A Uh-huh.

Q Never? Were you ever shown any papers or asked to sign any papers at the substation?

A Yes, they asked me to sign papers.

Q Do you know what it was?

A Well, I never get the chance to read it.

Q You didn't get the chance to read it?

A Uh-huh.

Q Do you read the English language?

A Yes, sir, I do. But at the time they tell me — say "we had already went over what was on the paper."

Q So how was the document — Or let me rephrase it. How is the document that you signed at the substation presented to you for your signature?

A Well, I don't know what was on the paper. All know, they asked me to sign the paper. And I asked them what it was about.

At the time, when I was fittin' to read it, he said we already went over it.

Q Were you given an opportunity to sign that — to read that document before you signed it?

A No.

Q It was just placed in front of you, you signed it and it was taken — just snatched away from you?

A Yes. And I asked them what the paper was about.

They tell me — say we already discussed that already at the scene.

Q So you were never given an opportunity to read anything that you signed that night?

A No.

Q Did you think it was important that may be you read something that you signed that night?

A Well, I — I don't know. I was scared. I don't know what was going on. I just signed it.

Q Okay. You made some statements that night, didn't you, to the police about you were paid $1,000 for you to pick up the cocaine in Miami and transport it back to Belle Glade?

A That was at the scene when he asked me — said, "where we was coming from?"

Q And in response to "where are you coming from," you said you were paid $1,000 to pick up cocaine in Miami, transport it back to Belle Glade. That's what you said?

A He said, "how much are you getting paid?" And I said, "$1,000."

Q Paid for what?

A Carrying the narcotics.

Q And you also told the officer that you knew it was cocaine in that purse?

A No, I didn't tell him.

Q Well, what do you think you were getting paid $1,000 for?

MR. ENTIN: Judge, object. That's outside the issue of consent as to whether she knew it was cocaine in the purse or not.

THE COURT: Excuse me, I think the question is —

MR. ENTIN: She never denied that she had seen it.

MR. GEISLER: My question, Judge —

THE COURT: Question was —

MR. GEISLER: She said she got $1,000. My question — my follow up question was, what was she getting $1,000 for.

MR. ENTIN: It's irrelevant as to the issue of consent if she got $1,000 to bring cocaine or something else.

MR. GEISLER: We're here to suppress statements.

THE COURT: It's to see if her credibility was an issue. If you don't want to answer that, that's fine, you can tell her not to answer. But you can tell her not to answer anything you don't want to answer.

The police officer said she told this to him and if she did —

MR. ENTIN: She's not denying she made the statement. I don't think that —

THE COURT: So what's the problem? What was the question?

MR. GEISLER: What were you getting paid $1,000 for that was my follow up question.

MR. ENTIN: I will instruct her not to answer the question.

MR. GEISLER: I just — That's one of the statements asked to be suppressed.

THE COURT: Fine.

MR. GEISLER: Okay.

Q When did you first see the dog outside of the police car?

A After —

Q If at all.

A When I first seen the dog outside of the car was after Pete take my bag out of the car and look in there. And after he look in the bag, he said, "we have a big one."

And at that time, he asked me — he say, "if we have anything else in the car that he should know about?" And I told him no.

So he go in his car and take out the dog. That's first time I see the dog come out of the car.

Q That's first time, that date, you saw the dog outside?

A Outside of the car.

Q How about when you saw — Did you see the dog when you and your passenger passed the parked police officers?

A Yes, I seen the dog inside the car.

Q The dog was inside the car?

A Yes, inside the car. And two of them was standing up outside of the car.

MR. GEISLER: Thank you. Nothing further.

THE COURT: Anything else?

MR. ENTIN: No, Your Honor.

THE COURT: Thank you, ma'am. You can step down. Do you have anything else to present as far as evidence?

MR. ENTIN: No, Your Honor.

THE COURT: State?

MR. GEISLER: No, Your Honor.

THE COURT: Okay. Let me take this other matter and then I will listen to argument.

(Thereupon, a recess was taken, after which the following proceedings were had:)

THE COURT: Okay. Let's hear argument.

MR. ENTIN: Judge, there's three primary issues that I believe the Court has to consider.

THE COURT: I already ruled on one. There was a valid stop.

MR. ENTIN: Can I, at least, argue for a record.

THE COURT: Go ahead.

MR. ENTIN: Judge, I did my motion. One of the issues I raised was pretextual stop. It's my position that Officer Rabino, when you read his testimony and recall what he said —

THE COURT: Did I read it? That's what I read.

MR. ENTIN: He was in that unit for several years when he made random stops. His primary occupation and function is having encounters and meeting people for stops.

I introduced the dog records into evidence to show the Court that on the last 70 or 75 times that the dog was used for his stop, approximately one third to one-and-a-half, I believe 25 to 35 times, pretained to drug seizures and drug activity on 75 and alligator alley. Yet they say they're randomly out there playing catch and ball instead of random encounter.

It's my position that it is a pretextual stop. That the tailgating was not the reason that this car was stopped. It was a 1985 car with all tinted windows, two black individuals. And I believe they suspected this car of having narcotics.

THE COURT: How can you tell it was black individuals?

MR. ENTIN: Soon as they stopped them.

THE COURT: But it has to be in their mind before they stop them. You're making that an issue, that it was two black individuals and dark tinted windows. How are they going to tell if it was black?

MR. ENTIN: I don't know if they knew it was black, but they stopped the car because it fit a profile.

THE COURT: It must be a profile; two black individuals driving a dark tinted car on 75, it sounds like you're setting up a profile.

MR. ENTIN: I believe, based on Rabino's deposition and his testimony in this hearing, on his knowledge with the Sheriff's Office, he spent three straight years of stopping people on profile encounters. That's all he did. In his testimony, he said over 500 times.

THE COURT: And they all got knocked out, at least on one that came to me got knocked down.

MR. ENTIN: I know. But what I point out to the Court, this is not a routine patrol officer. This is a person that had detailed experience on random encounters.

And it happens to be that the dog is out there and he's out there and the dog made 25 immediate drug sniffs in the area. And I don't think that issue is quickly decided.

As to the issue of consent which is the ultimate issue, I think before Your Honor, the Court has to make a finding that the consent was freely and voluntarily given and not done in a coerced manner.

When I point out to the Court is you have testimony from four individuals starting with most recently, Officer Fortunato, who you heard last week.

He tells this Court that he does a police report, yet has never been able to find it. He's relying on his recollection of approximately a year-and-a-half to two years ago as to what occurred of having made numerous arrests and drug stops since that date.

I don't think he came across truthful in his testimony. He was impeached consistently by his deposition when cross examined as to Godfrey's explanation as to where they were coming from. He said they came from Fort Lauderdale Swap Shop and in deposition he said from Miami.

When issue of consent is addressed by Fortunato, he said she shrugged her shoulders. He makes inconsistent statements between deposition and testimony before Your Honor,

as to what she says or if she said anything or if she appeared to understand.

He never unequivocally came forward and said, with any definitive answer, what this woman said as to the issue of consent. And I think his testimony is suspect and it's strictly based on his memory. And his report is lost as to what would be in there.

You have this individual, Godfrey, who testifies having never been arrested, no criminal activity, no interest in this case by the police officers belief as well as the State Attorney's Office, to date has no criminal culpability in this case. He testifies she met him one year ago, briefly, just to talk to him about what he observed. Was never questioned by anybody until I brought him in, again, to testify before Your Honor.

And Your Honor heard his testimony which is clearly consistent with there being no clear consent.

Officer Rabino testified many months ago, which I don't believe the Court has an independent recollection of.

THE COURT: That's why I'm reading his testimony.

MR. ENTIN: He testifies many months ago and his testimony, I believe, is suspect. And again, the issue of his previous experience comes to play when the Court discerns his credibility.

This is an officer, again, who for three years made random encounters, random stops; said that he was investigating narcotics all these times and wanted to search. And many of those searches were found to be suspect based upon consent.

In this particular case, you have Officer Rabino who testifies that he asked her for consent. In one portion of that deposition, I believe he said that she seemed not to understand at one point. At one point she appeared to agree. Then

she says, go ahead, then there's inconsistent statement in the probable cause affidavit.

And Judge, when these officers make these stops and they find a kilo of cocaine, they know that the exact words and consents are going to become an issue in everyone of these cases. Yet, not one of the two officers consistently say, on any occasion, is what she said as to the issue of consent. And I think that raises an issue as to the voluntariness.

If there's consent to take place, why wasn't the form executed at the scene and ratified at the scene? I'd also point out to the Court that when asked —

THE COURT: On Page eleven of his testimony, it says she said "I don't have any of those in my car."

"I asked if it would be okay to look. She said go ahead."

MR. ENTIN: Judge, if you look in the cross-examination —

THE COURT: That's what I'm getting to.

MR ENTIN: I think the cross is what I'm relying on.

THE COURT: Okay. What page is that on?

MR. ENTIN: It starts on Page 18, Your Honor.

THE COURT: I know that, but where you asked him the question. I am all the way up to this.

MR. ENTIN: I will find where it is. 35, at the bottom, Line 24 she responds to the question what are you looking for. What do you say? Answer, "I said, I don't have any of that in my car. And I said, is it okay if I look? And she said, go ahead."

And then I go on — on Line 9, she tells you she doesn't have any drugs in that car. Do you ask if you can look again?" Question after she — after the question back to me, "she

seemed to — didn't understand what I said, so I explained it to her again."

But then you go on between Pages 36 and 40 and you will see where I impeach him on several occasions with his probable cause affidavit, his deposition as to the wording, and what she said and what took place. And I think those are important for the Court to review.

THE COURT: On Page 37 —

MR. ENTIN: Judge, I think pages —

THE COURT: He says I believe so, yes, sir. "So you recall her saying go ahead and look?" "Best of my recollection, yes, sir."

And then the statement was inconsistent with that on Page 36, Line 19 of his deposition. He said, "okay. I asked her if she had any drugs in the car. She said no. I asked can we search your car. She said yes."

Testimony in the deposition was, "she said yes, is that correct?" "That's what I said in the deposition, yes, sir."

"Then you told the Court today that she said go ahead and look, is that correct?" "I'm telling you, she gave us verbal consent." "Is that your testimony today, she said go ahead and look?" "She gave us a verbal okay to search her car."

"Have you ever made another inconsistent statement — You testified in Court —Is that report prepared?" "Yeah, it says go ahead and search."

"Do you recall your response to the police report — in the police report, go ahead and search if you want to, is that correct?" "What I wrote, yes, sir."

"Based upon your experience in the interdiction unit," that's a very important response. Answer, "yes."

MR. ENTIN: If you [sic] looking at the top of 40.

THE COURT: To the best of my recollection, she says go ahead.

MR. ENTIN: Then he says go ahead.

THE COURT: Okay.

MR. ENTIN: Even if you go onto 41 you will see where there's more discussions about her consent. I asked him on the bottom of 40, Line 21, "did you ever ask for consent to have the dog search the car or that you would ask for utilization of the dog to search the car?" Just asked for consent to search the car, that's all.

THE COURT: Let me ask you a question, do you have some law that says if you get voluntary consent to search, that you can't use a dog?

MR. ENTIN: No, Judge. But another issue that rises, can they go and search her purse which is another unrelated item in the car.

If they want to search the car, that's one thing. The officer indicates he goes and searches the purse which is a separate complete entity from the car. It's a purse where she's got her personable belongings.

THE COURT: That's the first thing he searches?

MR. ENTIN: Yes. I would argue that you need a separate consent to search.

THE COURT: No, I think there's some cases on that. In fact, I think at one time it was something like that. It was one way and somebody said though you have to have separate consent, like the trunk, search baggage in the trunk. In fact, it was my case.

MR. GEISLER: Yes, it was, Your Honor.

THE COURT: And then they changed it and came back and saw it my way.

MR. ENTIN: Then, Judge. But what I'm trying to point out, to the car is that the officers in 41, going to again, asking her to consent to search with the dog, which is contradictory to what Fortunato and Rabino says because you're saying all they did was ask to search. And then you see in the deposition where I impeach him, there are discussions about Fortunato asking to use the dog.

And if you recall in Fortunato's deposition, he said she shrugged her shoulders and didn't do anything. And there's an issue as to how many consents she was asked to give and there's undoubtedly a question, two different times, they questioned her; one to search the car, one to search with the dog, where they got inconsistent answers.

On the bottom of 41, Line 22 where they're talking about "do you remember the question she didn't respond positively about the dog?" Answer, "she verbally consented to the search."

Question, "I know what you're saying." Answer, "and then when he said I don't remember if she said, yeah, that's fine or shrugged her shoulders or what he just said, ma'am, I'm going to use a drug dog."

Question, "do you remember that answer?" "You're asking me if she shrugged when I asked for consent to search? My answer is no."

That question was in — question was asked for Deputy Fortunato to get consent to use the dog. Then you see on Line 13 that he agrees he asked her twice and she just shrugs her shoulders.

THE COURT: He's talking about using the dog?

MR. ENTIN: Right.

THE COURT: But what I'm saying, I don't see what difference it makes. If Rabino gets consent to search the car, I don't see where Fortunato even has to ask her if he can use the dog. The dog can sniff the car.

I mean, until you have some law that says you can't use the dog to get consent to search —

MR. ENTIN: What I'm saying, between Pages 35 and 40, what's portrayed in there is a scenario where the officer said she consented. But when he's drilled on the actual verbiage of how the consent took place, there's three scenarios of how the consent took place.

THE COURT: I don't agree with that. Maybe it's a different word.

MR. ENTIN: But there's a difference between yes, go ahead and look, and yes, go ahead and search.

And then you have a scenario on 40 to 45 where they ask if they can search the dog and she shrugs her shoulders and then —

THE COURT: Right.

MR. ENTIN: And then you have officer —

THE COURT: That's a different person asking her. Rabino says he doesn't remember what was said by Fortunato. So he's — He asked her something, whether he could use the dog and she shrugged. That's what he's saying. He doesn't remember the words Fortunato used, but he remembers — he says he remember what he said and he remembers what she said to him.

MR. ENTIN: Okay. Judge, all I'm asking the Court is why can't he remember what words she said. He changes it in deposition and he changes it before Your Honor. Fortunato doesn't have a recollection of what he's questioned —

THE COURT: This is a 1990 case and, you know, you take his deposition or we had the hearing on August 1, 1991 which is obviously sometime later. I'm not sticking up for Officer Rabino, you're asking me questions. I don't know except that these people —

MR. ENTIN: Judge, it's just my recollection.

THE COURT: That's why they do reports, to refresh their recollection.

MR. ENTIN: Is there some unclearness to her wordage and also as to the questioning as to whether the dog was mentioned in the original questioning and whether she just shrugged her shoulders?

I point out to the Court that you have Godfrey Solomon that came into Court and indicating he appeared to be believable witness who gives a completely different version. And then Officer Rabino has no reason to come in here to lie. He's not any close family or friend of this lady who's getting a ride down there to return his radio.

And he came in there and testified, I believe, subject to cross-examination, in a cleared convincing manner as to the fact that the dog or that the officer found the cocaine without even the dog coming out and without any search.

You have the officer testifying —

THE COURT: What do you mean, without any search?

MR. ENTIN: I am sorry, without consent. You have the officer testifying, Fortunato, unequivocally that one of the things that raised suspicion is that he said he was coming from the flea market in Lauderdale.

THE COURT: Let me ask you this, taking what you're saying is true, is there such a thing as inevitable discovery?

So if Rabino got consents and meantime, Fortunato takes the purse without consent, Rabino did get consent, she doesn't know what Fortunato's doing, wouldn't — and Rabino got property consent, wouldn't they have found the purse anyway?

MR. ENTIN: Judge, I think the question is — I don't think Godfrey Solomon ever consented and the officers inevitablity is an issue.

The officer goes into the car without being advised that there's consent.

THE COURT: The question I had is, if Rabino did give consent and she doesn't know what Fortunato is doing, Fortunato doesn't know what Rabino is doing?

MR. ENTIN: You're assuming she did give consent and you're assuming she withdrew it before he got in the car.

THE COURT: She said she didn't give consent. She didn't say she gave it and withdrew it. I didn't hear any testimony like that.

MR. ENTIN: I am saying in the general scenario, the inevitablity is in the officer goes in, and illegally, and gets the bag then you're assuming that she gave consent in every scenario.

THE COURT: I am saying, assuming she gave proper consent to Rabino. While she gives consent to Rabino, Fortunato goes over to the passenger side of the car, when he's talking to Solomon, and he sees the bag there and he happens to take the bag. She doesn't know at that point he's talking to Rabino. He gets consent and he was going to search.

MR. ENTIN: I honestly don't have a legal answer to that, Judge.

THE COURT: Well, I'm saying, wouldn't he discover the bag anyway, even though Fortunato went into the bag without consent?

MR. ENTIN: I think it's irrelevant if Fortunato went into the car without knowing that the officer didn't have consent.

THE COURT: How about in all these discovery cases where they check — they arrest somebody and they stop them for a traffic stop or something and they find out later on that there was — or while they were taking him out for not having a license or something or while they're checking his license, they check his license with dispatch, find out his license has been suspended or there's a warrant, and they're going to take him anyway. Meantime, they have already went in the car and found drugs.

MR. ENTIN: The difference in there, they're going — the car's going to be inventoried no matter what because the person's going to be taken away.

In this case, hypothetically, if an officer goes in and searches, not knowing that the woman has given consent, that leads — it's inevitable that the woman couldn't withdraw consent.

I'm talking on a hypothetical level. In that case, where a person's going to get arrested inevitably every time, is going to show that the officer can search the car pursuant to inventory. Where a person goes into a car and then later hopes —

THE COURT: So she withdraw consent?

MR. ENTIN: Yes, a person is going to be arrested, the car is going to be inventoried.

THE COURT: Okay. I can see the distinction.

MR. ENTIN: I don't think it's a good law for society, for an officer, to go into a car hoping a person's going to give consent and inevitably if he's right.

THE COURT: We're not talking about what's a good law. We're talking about what is the law and what the facts are really.

Okay, what else?

MR. ENTIN: Judge, as to the issue of suppression of the statements, there's some fundamental areas that I think the Court has to review.

Number one, there appears to be a discrepancy as to when the statements were allegedly made. And I think that the Court has to first discern from the evidence as to whether the statements were made at the scene, some incriminating statements, or all of them or at the substation later where she was under interrogation.

What I point out to the Court is that I believe all of the evidence would reveal that this Defendant was never advised of *Miranda* warnings at the scene.

THE COURT: He admits that.

MR. ENTIN: Correct. So I would suggest to the Court, if it makes a finding that she was questioned at the scene as this Defendant testified, surrounding where she was coming from and what she was carrying and whether it was cocaine or not —

THE COURT: She wasn't in custody when he first asked her because they had talked about the discrepancy. That's why they were suspicious before they even asked for the consent, isn't that true?

MR. ENTIN: That's correct. She's not in custody. But what I'm pointing out to the Court, after the cocaine was discovered —

THE COURT: I don't think after the cocaine's discovered anything she said, until she's read her rights, I don't think should be suppressed.

MR. ENTIN: I think the Court has to make a finding that some of those statements — She testified and was cross examined by Mr. Geisler about the fact that she said she was getting paid $1,000 to bring the package from my Miami to Belle Glade. She testified that she said that in both locations or at the scene or possibly at the substation.

I think if that statement was made at the scene and it was in violation of any *Miranda* being read, then that statement should be suppressed without any acception.

Later at the substation when she's taken there, the officer claims that he read *Miranda* and that she seemed to understand. I point out to the Court that all parties agree that they were trying to have her deliver the package to Belle Glade and were trying to ascertain who was the person behind her, being as the Court would call it, a mule, transporting from one location to another.

I believe they brought in Lieutenant McCann for the purpose of substantial assistance to see if they, in fact, would deliver the package to Belle Glade, that she was facing all this serious time and the passenger was being considered for arrest or not arrest. And I would submit that the statements that she made at the substation were in violation of *Miranda*.

She had made those statements in consideration for trying to see if she can resolve the case or settle the case to her best interest, which are really statements in offer of settlement or statements made for inducement of leniency for future plea negotiations.

I think this doesn't take any different stance than substantial assistant statements where a person agrees to cooperate for reduced sentence and whether those statements are admissible.

In this case, she made those statements under the belief that they were trying to work a deal with her, that those statements would be utilized to give her leniency. And I think all parties agree and when Lieutenant McCann came in, they were trying to make this a larger investigation. I don't think those statements should be used against her.

THE COURT: Okay. Anything else?

MR. ENTIN: That's all.

THE COURT: Mr. Geisler?

MR. GEISLER: I understand that the Court had already decided the issue of the initial stop, that it was a valid stop, but I would like just, for the record, to cite some cases and still support the State's position. And I would like to give the defense counsel and the Court copies of these cases.

THE COURT: I don't want them.

MR. GEISLER: Would you permit me to cite the cases?

THE COURT: Yes, cite them in the record.

MR. GEISLER: Velez vs. State, 554 So. 2nd 545. Andrews vs. State, 540 So. 2nd 210. Porcher vs. State, 538 So.2nd 1278. And State v. Russell, 557 So.2nd 666.

Your Honor, since it has been determined that the stop was valid, the next step would be to determine the standard to be used for deciding whether consent was given freely and voluntarily.

And according to Velez v. State, that is the preponderance of the evidence standard. And in this case, the preponderance of the evidence does show that the Defendant consented to the searches as the Court has already noted in the transcript of the first hearing, August 1, 1991.

Deputy Rabino repeatedly, when he was asked on direct examination and on cross-examination, replied that the Defendant told him to go ahead and search the vehicle. For the record, I will cite Page 10, Line 24 —

THE COURT: I'll tell you what, I'm really interested in arguing Fortunato's testimony and his participation in all this, and Solomon's testimony. That's really what I'm interested in.

Rabino knows all the right words. He knows what to say and he knows — He said, I think there's a word here and

there slightly missing, you know, I really can't say he said anything different even though there's a different word, but they're basically almost the exact same thing.

MR. GEISLER: Yes, sir, Your Honor.

THE COURT: But let's talk about — That's what I want to to get into.

MR. GEISLER: Well, Deputy Rabino and Deputy Fortunato clearly had a right to be where they were because the stop was valid.

THE COURT: All right.

MR. GEISLER: So at that point, they use the dog. Deputy Rabino brought out the dog to do a sweep of the vehicle.

And according to Osorio vs. State, 569 So.2nd 1375, the court said that once a dog alerts, probable cause is established. So ultimately —

THE COURT: Well, Mr. Entin says that Fortunato's testimony was that he grabbed the bag himself.

MR. ENTIN: No, he says he got the dog.

THE COURT: He got the dog.

MR. ENTIN: He said he got the dog, that he brought the bag out. The dog sniffed the bag, but also Fortunato took the bag out of the car.

What Godfrey says, is Officer Fortunato took the bag out of the car, but the dog was in the car and that he just went in looking and got the bag.

THE COURT: Go ahead.

MR. GEISLER: Your Honor, I believe Deputy Fortunato testified that the dog did a sweep of the car and he allerted on the purse which was inside the car. And as I recall, Deputy Fortunato removed the purse from the dogs mouth.

THE COURT: I remember that.

MR. GEISLER: So right there, that's probable cause. And according to Osorio, the court said that's one of the appelants, consent to the search is not an issue. As long as the dog alerts, we have probable cause and the search is valid.

THE COURT: What about the consent? What about the statements?

MR. GEISLER: Statements made by the Defendant?

THE COURT: Yes.

MR. GEISLER: Well, Your Honor, according to Deputy Rabino and I believe Deputy Fortunato, the Defendant was read *Miranda* at the substation. And after she was read *Miranda*, then she made the statements about the thousand dollars she was being paid and the fact she was transporting the money to Belle Glade.

THE COURT: Mr. Entin indicated that she said it at the scene.

MR. GEISLER: According to —

THE COURT: After they found the drugs.

MR. GEISLER: Deputy Rabino and Fortunato both say that this was done at the substation. The testimony is consistent with one another. Neither of them — I see no discrepancy in Deputy Rabino's answers in the last hearing.

Also, the other point that defense counsel brought up was whether Deputy Fortunato or Deputy Rabino could search containers within the vehicle. And the case that the State would cite for that would be State of Florida vs. Jimeno. I will provide defense counsel and Court also if the Court wishes.

THE COURT: They probably cite my case in there.

MR. GEISLER: I will cite at 5 FLW Fed. S326. Supreme Court of Florida held that a criminal suspects's Fourth Amendment right to be free from unreasonable searches is not violated when, after he gives a police officer permission to search his car, they open a closed container found within the car that might reasonably hold the reason for the search.

THE COURT: This is not the case I — Okay.

Anything else?

MR. GEISLER: Just that Jimeno states that it would be objectionably reasonable for the police officers to conclude that since the Defendant gave them consent to search the vehicle, that it would be objectionably reason [sic] for them to assume that they have consent to search containers contained within the vehicle. And that no separate permission need be obtained for any other containers within the vehicle.

So Your Honor, the State has shown that by the Defendants statements to the police officers, that is, she's saying go ahead and search and also the consent to search form State's Exhibit 2, she signed at the substation on the form, she states that she was informed of her constitution —

THE COURT: I saw it.

MR. GEISLER: So clearly she gave unequivocal consent and Rabino's testimony and Fortunato's testimony is consistent with that.

THE COURT: Okay. I'll defer ruling on it. When's the case set for trial?

MR. ENTIN: I don't know if you want to order and review Officer Fortunato's testimony because I recall it different. I think it's going to be crucial to your decision. It wasn't long.

There's some sailing issues in there and also it goes to the consent issue as to heard Rabino say and it's inconsistent to what he said on cross.

THE COURT: What did you write down?

MR. ENTIN: My notes — I mean, I didn't take zealous notes of what he said because I was up there crossing him, but his recollection of her consent, at least that I remember, was she shrugged or he didn't remember exactly what she said. And he was able to — He wasn't in a position that he could hear.

THE COURT: But he didn't hear what she said, that's not a conflict?

MR. ENTIN: No, but it's important to consider the preponderance of the evidence when you have an officer standing there —

THE COURT: I'll tell you what, I grant many searches where the officer couldn't remember or didn't know the words that he used. But what I'm saying in this case, Rabino said the right words. I don't know, you know.

MR. ENTIN: Okay. That's all, Judge.

THE COURT: Okay. I will let you know.

MR. ENTIN: Thank you.

(Thereupon, the proceedings were concluded.)

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA

STATE OF FLORIDA

CASE NO. 90-22943 CF

vs.

Fort Lauderdale, Florida

JANICE McLEOD, February 1, 1993

Defendant. 9:30 a.m.

THEREUPON, the Honorable Judge Stanton S. Kaplan's docket was cancelled that day.

Subscribed and sworn to before me this 24th day of March, 1993, in the City of Fort Lauderdale, County of Broward, State of Florida.

NOTARY PUBLIC

My Commission Expires:

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA

STATE OF FLORIDA

CASE NO. 90-22943 CF

vs.

Fort Lauderdale, Florida
JANICE McLEOD, February 1, 1993
Defendant. 9:30 a.m.

APPEARANCES:

DALE GEISLER, ESQ., Assistant State Attorney,
appearing on behalf of the State.

MICHAEL JAMES ENTIN, ESQ.,
appearing on behalf of the Defendant.

The above—styled cause came on for hearing before the Honorable STANTON S. KAPLAN, Presiding Judge, at the Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 1st day of February, 1993, commencing at 9:30 o'clock a.m.

Thereupon, the following proceedings were had:

THE CLERK: Janice McLeod.

MR. GEISLER: This is a case last week where you granted the motion to suppress based upon review of the case.

THE COURT: Yes.

MR. GEISLER: I'd like to bring to the Court's attention one additional case for the Court's consideration if I might. I've already given a copy to defense counsel, State v. Orozco, 17 FLW D2309. Same DCA decided that, I think about 6 weeks before the Dominguez case.

In Orozco, it's a search of a car. The car was stopped for speeding and wreckless driving. Consent to search was refused. A dog came up, alerted on the pickup truck and cocaine was found in her purse inside the trunk itself.

And the Third DCA said this act to wreckless is probable cause for the police to arrest Defendant, Orozco. And then there's cited a paragraph beginning with once the Defendant was legally stopped on the second column, the use of a sniff dog was not an unconstitutional search according to the Fourth Amendment. The search of the dogs is probable cause to conduct a search. Once probable cause existed, the search of the vehicle, no warrant was needed to authorize a search.

THE COURT: They cited a Third District Court —

MR. GEISLER: Yes.

THE COURT: Maybe they changed their mind a month later.

MR. GEISLER:

They may have changed their mind, but the facts are somewhat different. Here it's a car. In the Dominguez case, it was a search of a residence.

Residences throughout time have been given more protection than a car.

Your Honor, I'm just making this argument to the Court for reconsideration. That's my argument.

MR. ENTIN: Judge, with all due respect, this case isn't close for the following reason:

Number one, there was a tip that the man was going to be carrying narcotics.

Number two, in this case, it said he comitted a high speed chase and was going to be arrested for high speed driving in which he and the car would have been searched. And the police dog handler, a member of the surveillance, walked his

K-9 around the truck. The dog alerted to the presence of the cocaine.

The dog never went into the car or truck in that case. They have a right — They have a legal right to walk the dog around the truck without consent.

In our case, the dog went into the car and into her purse to find the cocaine. So this case, I think if you read it, is not even close to the factual scenario that we have here.

THE COURT: I think the distinction is the first thing you said, about they had a right to go in the car anyway if they were going to arrest him. Is that what's happening here in this case?

MR. ENTIN: Yes.

MR. GEISLER: Yes.

THE COURT: Based on — I think the enivtable discovery would be a —

MR. ENTIN: You will see here, Judge.

THE COURT: Otherwise, you will have a situation where like at the airport, dog sniffs, that's probable cause to —or dog alerts on a bag, then open up.

I just think my decision will be the same. So do you want to appeal on it?

MR. GEISLER: I have been advised by the appellate division it would be appealed. So once the order's signed, I will prepare the necessary paperwork.

THE COURT: Is this the right order?

MR. ENTIN: I submitted an order with Mr. Geisler's approval.

MR. GEISLER: I have no objection to the order being signed.

THE COURT: I need to read it. So I'll sign it today.

MR. ENTIN: If you want any changes, just call me.

THE COURT: I'll look at it today.

MR.GEISLER: Thank you, Your Honor.

MR. ENTIN: This will be taken off the docket then.

MR. GEISLER: Yes. I'll ask for a State continuance pending the paperwork to affect the appeal.

THE COURT: You're moving to stay?

MR. GEISLER: Yes, Judge, I will bring the paperwork down.

MR. ENTIN: Okay. Thank you very much, Judge.

MR. GEISLER: Thank you, Your Honor.

(Thereupon, the proceedings were concluded.)

CERTIFICATE

"I, LISA COOK, hereby certify that the foregoing, pages 132 and including 187, is a true and correct transcription of my stenographic notes of the proceedings had before the Honorable STANTON S. KAPLAN, presiding Judge, at the Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 8th day of July, 1992, and the 1st day of February, 1993, commencing at 9:30 a.m.

In witness whereof I have hereunto affixed my hand this 24th day of March, 1993."

LISA COOK
Shorthand Reporter

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA

STATE OF FLORIDA

CASE NO. 90-22943 CF10A

vs. JUDGE: KAPLAN

JANICE McLEOD,
Defendant.

MOTION TO SUPPRESS PHYSICAL EVIDENCE AND TESTIMONY RELATING THERETO

COME NOW the Defendant, JANICE l. McLEOD, by and through her undersigned attorney, and pursuant to rule 3.190(h) of the Florida Rules of Criminal Procedure, respectfully moves this Honorable Court for an Order suppressing as evidence in this cause, the following tangible items of property and evidence seized as a result of exploratory search and illegal arrest on November 7, 1990, by members of the Broward Sheriff's Office:

1. All physical items seized from the person of the Defendant or her vehicle including:

   a. Cocaine wrapped in clear plastic tape;

   b. Checkbook, purse, phone book, items in purse, keys, sponge, and bullet;

   c. All photographs taken by members of the Broward's Sheriff's Office pertaining to the seizure;

   d. Lab reports, lab analysis, property receipts, fingerprint reports, fingerprints, and the testimony of Officer Steve Rubino, Officer Peter Fortunato, and any other officer present when the Defen-

dant was detained and illegally arrested on November 7, 1990.

e. Any and all testimony or physical evidence that were the fruits of the Defendant's detention and seizure.

As grounds for this Motion the Defendant, JANICE MCLEOD, would show unto this Court that the evidence mentioned above was obtained from law enforcement officers as a result of an illegal arrest in violation of the Defendant's rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, and Article 1, Section 12 of the Florida Constitution, in that:

1. The evidence was illegally seized without a warrant because:

   a. The search followed an illegal detention and illegal arrest;

   b. There was no probable cause to justify the arrest of the Defendant;

   c. The Defendant never freely, knowingly or voluntarily consented to the search of her vehicle, purse, or person in this matter;

   d. That said search was incident to an unlawful arrest and detention, and the evidence seized thereby represents the "fruits of the poisonous tree." See *Wong Sung v. United States,* 371 U.S. 407, 408 (1963);

   e. The connection between the illegal search and the discovery of the evidence sought herein to become suppressed has not become sufficiently attenuated as to dissipate the taint of the original lawless conduct of the police. See *Nardon v. United States,* 308 U.S. 338, 341 (1939); *Wong Sung, supra.*

2. A Memorandum of Law I support of the Motion to Suppress stating additional grounds and case law has been attached hereto and incorporated as part of this Motion.

3. Other grounds will be sought to be argue ore tenus at a hearing in this matter

WHEREFORE, the Defendant, JANICE L. MCLEOD, respectfully moves this Honorable Court to grant his Motion to Suppress Physical Evidence and Testimony Relating Thereto, and preclude the State of Florida from introducing at a trial in this cause, any and all of the items enumerated above that were seized from the Defendant on November 7, 1990, and subsequently forwarded to the Broward Sheriff's Office Laboratory and Evidence Room.

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished to Dale Geisler, State Attorney's Office, 201 S.E. 6th Street, Ft. Lauderdale, Florida 33301 on this *3rd* day of May, 1991.

MICHAEL J. ENTIN, ESQ.
Attorney for Defendant
Penthouse Barnett Bank Plaza
One East Broward Blvd.
Ft. Lauderdale, FL 33301
Telephone: (305) 522—7000
Florida Bar No: 270261

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

CASE NO. 90-22943 CF10A
JUDGE: KAPLAN

JANICE McLEOD,
Defendant.

MEMORANDUM OF LAW IN SUPPORT
IN SUPPORT [sic] OF DEFENDANT'S MOTION TO
SUPPRESS EVIDENCE

STATEMENT OF FACTS

Janice McLeod, a resident of Belle Glade, Florida, was travelling on U.S. 27, four (4) miles North of State Road 84, when she was unlawfully detained, interrogated and searched by Deputies Steven Rubino, Pete Fortunato and K-9 Paulchin of the Broward County Sheriff's Office. The Defendant contends that the detention, interrogation, and search of her vehicle was without legal and/or factual justification. The unlawful intrusion by the police officers and K-9 into her motor vehicle resulted in the recovery of a purse containing approximately one kilogram of cocaine. The circumstances surrounding the search of the Defendant's vehicle and purse contained therein constitutes the basis for this Motion.

The Officers in this cause professed that Ms. McLeod was stopped for tailgating. Subsequent to the stop of the vehicle Ms. McLeod was driving, the Officers demanded her license, registration, and insurance card. That although the Officers believed her to be committing the traffic offense of "tailgating," she was never issued a uniform traffic citation in this matter. The officers wore full uniforms and had their emer-

gency equipment on during the entire detention of Ms. McLeod. Further, the Officers segregated Ms. McLeod from her passenger and proceeded to interrogate each of the individuals separately.

Deputy Rubino is an experienced Sheriff's Officer who is formerly assigned to the infamous airport and bus station interdiction units who are found by various courts to use coercive tactics in seeking the alleged consent of various citizens. It is the position of the Defendant that Deputy Rubino relied on his training in the interdiction unit to obtain the coerced consent from her. Deputy Rubino claims that after he returned her license, registration, insurance card, and a warning citation, he stated to her, "...It is in the scope of our duties to contact people or to ask people for their cooperation, and I explained to her that U.S. 27 is a major drug transshipment point, and we routinely ask cooperation to travel in public and search the vehicles for drugs. And I asked her to consent to a search of the *vehicle.*" (deposition of Rubino Page 35). The Defendant contends that Deputy Rubino without justification or upon irrationally placed suspicion had turned what the State will allege is a valid traffic stop into a criminal investigative interrogation. Deputy Rubino at no time advised Ms. McLeod of her right to refuse a search or even advised her that he was conduction a criminal investigation. He failed to advised her of her *Miranda* warnings after the issuance of the warning and the return of her driver's license and other items. Deputy Rubino did not advise the Defendant that she was free to leave. He asked if she had drugs in the car and she responded no (Page 36 of Rubino's deposition). That during the illegal detention of Ms. McLeod it was perceived by Deputy Rubino that the driver and passenger had given inconsistent explanations as to their whereabouts prior to being stopped. Deputy Rubino indicated that this was the only basis upon which he based his request to search the vehicle and its contents. "I had a problem with the inconsistent story; and

beyond that, nothing really special other than being a random type stop." (Page 37 of Deputy Rubino's deposition).

After having purportedly obtained the consent from Ms. McLeod, Deputy Fortunato along with K-9 Paulchin entered the motor vehicle of the Defendant. Purportedly the K-9 alerted on Defendant's closed purse within the motor vehicle which was retrieved and opened without the benefit of a warrant.

It is the Defendant's contention that this Court must interdict the police from interfering with the traveling public and that the extension of the coercive tactics by the Broward County Sheriff's Department to the roadways of this State cannot be permissible nor justified by the fear of drugs in our society. To give up our rights and to create a Police State was never the intention of the framers of our Constitution.

THE PRETEXT STOP

A seizure of a person which is ostensibly for one purpose but in reality is in furtherance of an ulterior goal is unreasonable under the Fourth Amendment. *United States v. Lefkowitz,* 285 U.S. 452 (1932); *United State v. Smith,* 802 F.2d 1119 (1986); *Taglovore v. United States,* 291 F.2d 262, 265 (9th Cir. 1961); and *Warren v. City of Lincoln Nebraska,* 816 F.2d 1254 (8th Cir. 1987). In *Taglovore,* the police, while in reality suspicious of narcotics activity, arrested the Defendant pursuant to a warrant based on traffic violations. Although the police had probable cause (and a warrant) to arrest the Defendant for traffic violations, they did not have probable cause to arrest for narcotics violations. The Ninth Circuit reversed the Defendant's conviction and held that: "when the arrest is only a sham or a front being used as an excuse for making a search; the arrest itself and the ensuing search are illegal." *Taglovore,* 291 F.2d 265. The *Taglovore* Court held that the "true purpose" of the arresting officers

was to search the Defendant for narcotics, not to arrest him for traffic violations. The Court went on to say:

> "The violation of a Constitutional right by subterfuge cannot be justified, and the circumstances of this case leave no other inference than that this is what was done with the traffic arrest warrant here. With the use of misdemeanor arrest warrants as a pretext for searching people suspected of felonies to be permitted, a mockery could be made of the Fourth Amendment and its guarantees. The Courts must be vigilant to detect and prevent misuse of legal processes." *Taglovore,* 291 F.2d 266

More recently, the Eleventh Circuit has enunciated the test to determine when an investigatory stop is unreasonable or pretextual. It is an objective one. "The proper inquiry....is not whether the officer *could* validly have made the stop, but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose" *United States v. Smith,* 799 F.2d 704, 709 (11th Cir. 1986) (emphasis in original) (citing, *United States v. Cruz,* 581 F.2d 535 (5th Cir. 1978). In *Smith,* a state trooper who suspected that the Defendant might be transporting drugs followed his vehicle for several miles. The trooper finally pulled him over allegedly because of a minor traffic violation. The trooper testified that he stopped Mr. Smith after he had weaved, although he admitted that the true purpose for stopping the Defendant was to make an investigatory stop. Although the trooper's hunch turned out to be correct, the Court held that the trooper's stop of Mr. Smith's car was unreasonable search under the Fourth Amendment because its purported rationale was merely a pretext for an invalid purpose. *Smith,* 799 F.2d 711. The Court emphasized that it was not concerned with the Trooper's subjective intent, but rather with what a reasonable officer would (rather than could) do absent the invalid purpose.

Because no reasonable trooper would have stopped Mr. Smith for his weaving,(the Court held that there was not traffic violation), the contraband was suppressed.

By looking at what an officer would do, the necessary connection, under *Terry v. Ohio,* between the seizure's justification and its scope are held in tack. Such a rule is necessary to insure that "each stop is justified at its inception and is related to the circumstances which justified the stop in the first place," *Smith,* 799 F.2d 711.

The Supreme Court of the United States has disapproved random stops made by law enforcement officers in an effort to apprehend unlicensed drivers and unsafe vehicles. The Supreme Court observed that this practice would permit a "kind of standardless and unconstrained discretion which is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent" *Delaware v. Prouse,* 440 U.S. 648, 661, 99 S.Ct. 1391, 1400, 59 L.Ed. 2d 660, 672 (1979). "Were the individual subject to unfettered Governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed" 99 S.Ct. 1401.

In *Blair v. State,* 563 So. 2d 824 (2d DCA 1990), the Court based its position that in order for a temporary detention of the Defendant to be lawful, the officer must have a "founded" suspicion of criminal activity. The Court further stated that a "bare" suspicion of illegal activity cannot support a stop. The Supreme Court of Florida in *Kehoe v. State,* 521 So. 2d 1094 has adopted the Federal law to the extent of reviewing police actions authorizing them to stop and investigate motor vehicles when there is a"founded suspicion of criminal activity. However, there has been a significant limitation as to the police officers speculative opinions by the requirement that rounded suspicion have some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in light of the officer's knowledge. In

this case, the officer has conceded that there was nothing suspicious or factual to justify his belief that criminal activity was underfoot. The Defendant further contends that the Supreme Court of Florida in *Kehoe* created a test whereby this Court must assess the cumulative impact of circumstances as they were perceived by the officer to determine whether suspicion of criminal activity was sufficiently established overriding Ms. McLeod's right to be free from illegal searches and seizures.

Further, the Defendant contends that the State must show that on these facts and circumstances a reasonable officer would have stopped the vehicle absent an additional, invalid purpose overcoming the presumption that this was a pretextual stop. The Supreme Court in rendering its opinion in *Kehoe,* stated "...the Fourth Amendment constrains on intrusive searches and seizures transcend other concerns. Allowing the police to make unlimited stops based upon the faintest suspicion would open the door to serious constitutional violations. It is difficult to operate a vehicle without committing some trivial violation..." at 1097.

The Courts of Florida have consistently questioned police tactics such as have been exhibited in this case as it pertains to the basis for the stop and its justification. Most recently in *C. V. H. v. State,* 566 So. 2d 1235 (5th DCA 1990) the court reversed the conviction finding that a reasonable officer would not have stopped the vehicle in the absence of more, finding that the State had not carried its burden under facts more severe and compelling to the state's position than those in this case. *Kehoe v. State, supra, Clemens v. State,* 533 So. 2d 321 (Fla. 5th DCA 1988); *Porcher v. State,* 538 So. 2d 1278 (Fla. 5th DCA 1989); and *Monroe v. State,* 543 So. 2d 298 (Fla. 5th DCA 198).

It is the Defendant's contention that this Court must first ascertain the validity of the stop of the Defendant's motor vehicle and the Court must determine whether "under the facts and circumstances a reasonable officer would have

stopped the vehicle absent an additional invalid purpose." *Kehoe v. State, supra.*

The search of an automobile by officers who have stopped the motor vehicle on the pretext of a minor traffic violation in order to search without a warrant for evidence of unrelated offenses has long been established to be illegal and the evidence thus inadmissible. *Riddlehoover vs. State,* 198 So. 2d 651 (Fla. 3rd DCA 1967).

THE DETENTION

The law is well settled in that even should there be a proper stop of a motor vehicle, an officer lacking a founded suspicion of criminal activity cannot enlarge the length of contact with the travelling public any longer than it would take to write out a traffic citation. *State v. Anderson,* 479 so. 2d 816 (Fla. 4th DCA 1985).

In determining whether the encounter between the Defendant and the officers was a mere contact giving rise to voluntary cooperation, or a seizure, bringing into play the full panoply of rights guaranteed by the Fourth Amendment of the United States Constitution, the Court must be in a position to answer the crucial consideration as to whether the person was under the reasonable impression that he was free to leave the officers presence. *State v. Frost,* 374 So. 2d 593, 597 (Fla. 3rd DCA 1979) which adopted the test as set forth in *United States v. Wylie,* 569 F.2d 62 (D.C. Cir. 1977). The Wylie Court stated that in determining whether the Defendant was under the reasonable impression that he or she was not free to leave, the test must be that of a reasonable man, innocent of any crime and what that individual would think had he been in the Defendant's shoes. In looking at the totality of the circumstances of the encounter between Ms. McLeod and the officers and the K-9 unit as evidenced by the testimony herein, the Court must closely scrutinize whether those circumstances reveal the presence of any coercion. There is further emphasis that for reasonable

suspicion to exist there must be "specific and articulable facts which, taken together with rational emphasis from those facts, reasonably support a belief that the person seized is engaged in criminal activity." *Terry v. Ohio, supra; Reed v. Georgia,* 100 S.Ct. 2752 (1980); *Brown v. Texas,* 443 U.S. 47 (1979). In *United States v. Berry,* 670 F.2d 583 (5th Cir. 1982), the Court stated "however great in the Government interest and however great the difficulty in ending drug smuggling, such reasons cannot be used as an excuse for suspending the Fourth Amendment as regards a search or arrest." The Court in *Terry v. Ohio, supra,* at Pages 20–27 expressed their opinion that seizures based on "unparticularized suspicion" or mere "hunches" of an officer would certainly constitute a violation of ones Fourth Amendment rights. In the present case, the only basis for the officers suspicion was purportedly an inconsistency that took place in conversation after the uniformed officer with lights blazing, along with a large K-9 had exercised control by having segregated M. McLeod from her passenger. The contact also took place after he did not have justification to come in contact with Ms. McLeod since no traffic citation had been issued and there was no further reason for contact with her.

A law enforcement officer may temporarily detain a person for purposes of investigation under circumstances reasonably indicating that the person has committed, is committing, or is about to commit a crime. Section 901.151, Florida Statutes (1987). There is no indication that such circumstances took place in this case. Although the detention may be based upon something less than probable cause, it must be based upon more than a mere or bare suspicion of criminal activity. *Coladonato v. State,* 348 So. 2d 326 (Fla. 1977); *G.J.T. v. State,* 469 So. 2d 826 (Fla. 2nd DCA 1985). To justify temporary detention of a person, there must be a founded suspicion in the mind of the police officer that the person has committed, is committing, or is about to commit a crime. *G.J.T. v. State, supra,* and *Kearse v. State,* 384 So. 2d 272

(Fla. 4th DCA 1980); *Mitchell v. State,* 558 So. 2d 72 (Fla. 2nd DCA 1990).

"It is also well settled that when a law enforcement officer signals a motorist to stop by use of a siren or red light, there has been a seizure which must be justified under the Fourth Amendment." *United States v. Robert L.,* 874 F.2d 701, 703 (9th Cir. 1989).

The Defendant did not consent to the search of her motor vehicle nor consented to the search of her purse found within the motor vehicle. The State has not produced nor will the State be able to produce any evidence that some event occurred in the confrontation with the Defendant sufficient to alleviate the taint of the illegal police action so as to render any action on the part of the Defendant as being considered as consensual to be held valid, a showing must be made that the consent was voluntarily given. *Bailey v. State,* 319 So. 2d 22 (Fla. 1975). Voluntariness requires more than mere acquiescence to a claim of lawful authority. *Jordan v. State,* 384 So. 2d 277; *Augram v. State,* 364 So. 2d 821 (Fla. 4th DCA 1980). The United States Supreme Court held in *Schneckloth v. Bustamante,* 412 U.S. 218 (1973), that valid consent requires "voluntariness" that will be determined by the totality of the circumstances. The *Schneckloth* Court cautioned that "no matter how subtlety the coercion was applied, the resulting consent could be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."

Additional factors which must also be considered include, the presence of the police procedure and the awareness of the Defendant of his or her right to refuse a search, the Defendant's awareness of his or her right to consult an attorney, and the Defendant's belief as to whether incriminating evidence will be found. In the present case, the most significant factor of all is the Defendant's purported acquiescence to the apparent authority of the officers in the light of the fact that they were both in uniform, the emergency

equipment on their motor vehicle were activated, and the original reason for the contact long since dissipated. The officers had segregated the subject from her passenger and was now making inquiries and creating a confrontational situation as to why there was a discrepancies in what each of the individuals stated to the respective officers. The Defendant contends that had these officers advised the Defendant of her rights prior to requesting the verbal consent lessen the probability of coercion. However, though these rights and the appropriate search authorization forms existed, the officers chose to rely upon the verbal contact with the defendant later seeking by the execution of a consent form to legitimize a previously coercive situation.

This Court is well aware that the prosecutor has the burden of proving the Defendant's consent under the long line of cases previously argued before this Court. This Court must examine all of the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtlety coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. *United States v. Garcia,* 890 F.2d 355, 360 (11th Cir. 1989). Consent given after an unlawful stop is presumptuously involuntary. *Gadsden v. State,* 498 So. 2d 1339 (Fla. 2nd DCA 1986). When the validity of a search rests on consent, the State must demonstrate that such consent was unequivocally given, and not merely acquiescence to the apparent authority of the police. *Talavera v. State,* 186 So. 2d 811 (Fla. 2nd DCA 1966). *Thompson v. State,* 555 So. 2d 970 (Fla. 2nd DCA 1990).

SCOPE OF CONSENT

In *Luxenberg v. State,* 384 So. 2d 742 (Fla. 1st DCA 1980), the suspect had voluntarily complied with an agricultural inspector's request to open the rear of his truck and to open one of a number of boxes in the back. When the inspector saw a black plastic bag inside the box, the Defendant remained silent and the inspector grabbed the bag, opened it

and found marijuana. Finding the search illegal, the Court held that the driver's consent was limited to opening the trunk and box; "his actions in no way authorized (the inspector) to grab the bag and tear it open." Ibid at 743. See also *State v. Carney,* 423 So. 2d 511 (Fla. 3rd DCA 1982), *Leonard v. State,* 431 So. 2d 614 (4th DCA 1983). There is no argument in this case as indicated by the facts that should there have been a valid consent it was limited to the search of the *vehicle* [emphasis added]. Should this consent be deemed to be valid it did not extend to close containers within the motor vehicle, ie., the Defendant's purse. In *Wallace v. State,* 557 So. 2d 212 (Fla. 2d DCA 1990), Second District Court held that a driver's consent to look in a vehicle did not permit the officer to look inside a lady's cosmetic kit within the vehicle, which kit was neither locked nor sealed. In this particular case a trooper stopped the Defendant and asked for his driver's license and registration. The officer advised the Defendant that he was going to issue him a correction notice instead of citation. In the meantime, another trooper arrived with a narcotics dog at which time the trooper's asked the Defendant if they could "look around" the Defendant allegedly said go ahead at which point the dog alerted from outside the motor vehicle at which point in time the officers seized from within the vehicle a closed cosmetic kit. In rendering its opinion the Second District Court of Appeals relied upon its prior decisions in *Stated v. Abraham,* 548 So. 2d 820 (Fla. 2nd DCA 1989), and *State v. Neeley,* 548 So. 2d 1165 (Fla. 2nd DCA 1989) which held that a search of closed containers exceeds the scope of a general consent. In the present case, this Defendant contends that even if a general consent was given that this Court deems to have been noncoercive, the Defendant contends that any consent did not include the utilization of purported "drug dog" to enter the motor vehicle and conduct a sniff test. Further, any purported consent did not extend to the Defendant's closed purse located within the motor vehicle.

CONSENT AFTER ARREST

An alleged voluntary consent to search must be viewed with caution and misgivings if given after arrest. This Court must look to all of the facts and circumstances in determining whether a consent after arrest is freely given *United States v. Shields,* 573 F.2d 18, 23 (10th Cir. 1978). It is the Defendant's contention that under the facts and circumstances of this particular case a reasonable officer would not have stopped a vehicle absent an additional invalid purpose. The officers continued on their unauthorized and inappropriate contact with the Defendant. The officers illegally searched the motor vehicle, and at a later time sought to legitimize their actions by submitting to one now in custody and under arrest the consent form authorizing their illegal entry. It is the Defendant's contention that the police officers in this case cannot undue the taint of the original illegality.

CONCLUSION

"Although I recognize that the traffic and elicit drugs is a matter of pressing national concern, that cannot excuse this Court from exercising its unflagging duty to strike down official activity which exceeds the confines of the Constitution." Justice Brennen continued in quoting from Justice Stewart's opinion in *Cooledge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 LED. 2d 564 (1971), in discussing the Fourth Amendment as follows: "In times of unrest where the cause by crime or racial conflict or fear of internal subversion, this basis law and the values that it represents, may appear unrealistic or extravagant to some. But the values where those of the authors about fundamental constitutional concepts."

In concluding, Justice Brennen stated "we must not allow our zeal for effective law enforcement to blind us to the parallel to our free society that lies in this Court's disregard of the protections afforded by the Fourth Amendment."

More recently Circuit Court Judge Robert L. Andrew of the Seventeenth Judicial Circuit stated in rendering its Circuit Court opinion in the case of *State v. Florida v. Kerwick,* 86-8647 stated:

> "even if the rulings of law made herein were not amply supported by the evidence, the Court would find extremely troublesome the admitted policies of these Broward Deputies regarding "encounters" with the public." Despite the apparent protections of Article One, Section 23 of the Florida Constitution, commonly referred to as a "right of privacy," the evidence in this cause has invoked images of other days, under other flags, when no man travelled his nations roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The specter of american citizens being asked, by badge wielding police, for identification, travel papers — insured a *raison deter* — is foreign to *any* fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains ("if time permits") and check identification, tickets, asked to search luggage — all in the name of voluntary cooperation with law enforcement to the shocking extent ... in the Court's opinion the founders of the Republic would be thunderstruck. It certainly shocks the court's conscious that the American public would be "asked," at badgepoint, without the slightest suspicion, to interrupt their schedules, travels, and individual

> liberties to permit such intrusions. This Court would ill-expect any citizen to reject, or refuse to cooperate when faced with the trappings or power like badges and identification cards. And these officers know that — that is one reason that they display those trappings. It is much like the feeling that an ordinary citizen has when seeing a patrol car behind him, or observing blue lights flashing, or being confronted by a police officer asking questions..."

The facts as contained in the record before this Court are not sufficient to provide the reasonable suspicion of criminal activity necessary to justify the original stop, detention, search and seizure of the Defendant. In deed, considered individually or collectively, the actions of the police officers at each state of their investigation is not supported by any lawful or appropriate authority. Further, the Defendant was seized illegally, searched illegally, detained illegally and denied any of her constitutional rights and that any consent considered by this Court to have been given was tainted by the original illegality of seizure and constitutes overriding acquiescence to the forced authority of the officers.

For all of the foregoing reasons, the Defendant, respectfully requests this Honorable Court that her Motion to Suppress be granted.

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law in Support of Defendant's Motion to Suppress Evidence has been furnished to Dale Geisler, State Attorney's Office, Broward County Courthouse, 201 S.E. 6th Street, Room 620, Ft. Lauderdale, Florida 33301 on this 9 day of May, 1991.

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IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NO. 90-22943 CF10A
JUDGE: STANTON S. KAPLAN

JANICE McLEOD,
Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE AND TESTIMONY RELATING THERETO

THIS CAUSE coming on to be heard upon the Defendant's Motion to Suppress Physical Evidence and Testimony Relating Thereto, and the Court having considered said Motion, having heard testimony of witnesses and argument of counsel, and being otherwise fully advised in the premises, the Court finds as follows:

On November 7, 1990 in Broward County, Florida, Defendant, Janice McLeod, was driving a motor vehicle north on U.S. 27. Broward Sheriff's Office Deputy Steven Rubino and Deputy Peter Fortunato observed the Defendant following a tractor trailer too closely. Deputy Rubino proceeded to stop the Defendant while Deputy Fortunato acted as a backup. Deputy Rubino asked the Defendant for her driver's license and registration. He then gave her a written warning for tailgating. Deputy Rubino returned the documents to the Defendant. He then asked her for consent to search

the vehicle for narcotics. The Defendant told Deputy Rubino to "go ahead." Deputy Fortunato then conducted a sweep of the vehicle with his K-9. The K-9 alerted on a purse inside the car. Deputy Fortunato took the purse from the K-9's mouth. Deputy Fortunato found a kilo of suspected cocaine as well as a checkbook with the Defendant's name on it in the purse. The Defendant and her passenger were then taken to the Broward County Sheriff's Office substation where Deputy Rubino read the Defendant her *Miranda* rights from a card. The Defendant stated she understood her rights. The Defendant also read and signed a consent to search form at the substation.

As a result, the Court finds:

1. Deputy Rubino and Deputy Fortunato performed a valid traffic stop,
2. The Defendant freely and voluntarily gave verbal consent to a search of her vehicle,
3. The Defendant freely and voluntarily gave written consent to a search of her vehicle,
4. In addition, Deputy Rubino and Deputy Fortunato, having legally stopped the Defendant, had probable cause to search the defendant's vehicle due to the sniff dog's alert, and
5. The general consent to search the Defendant's vehicle was consent to search containers with the vehicle.

THEREFORE, IT IS ORDERED AND ADJUDGED that the Defendant's Motion to Suppress Physical Evidence and Testimony Relating Thereto is hereby denied.

DONE AND ORDERED in Fort Lauderdale, Broward County, Florida this 21 day of July, A.D. 1992.

HONORABLE STANTON S. KAPLAN
Judge of the Circuit Court

copies furnished:

Michael J. Entin
Attorney for Defendant

Dale H. Geisler
Drug Trafficking Unit

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NO. 90-22943 CF10(A)
JUDGE: STANTON S. KAPLAN

JANICE McLEOD,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS CONFESSIONS, ADMISSIONS AND STATEMENTS

THIS CAUSE coming on to be heard upon the Defendant's Motion to Suppress Confessions, Admissions and Statements and the Court having considered said Motion, having heard testimony of witnesses and argument of counsel, and being otherwise fully advised in the premises, the Court finds as follows:

> On November 7, 1990 in Broward County, Florida, the Defendant, Janice McLeod, was driving a motor vehicle north on U.S. 27. Broward County Sheriff's Office Deputy Steven Rubino and Deputy Peter Fortunato observed the Defendant following a tractor trailer to closely. Deputy Rubino proceeded to stop the Defendant while Deputy Fortunato acted as backup. Deputy Rubino asked the Defendant for her driver's license and registration. He then gave her a written warning for tailgating. Deputy Rubino returned the documents

to the Defendant. He then asked her for consent to search the vehicle for narcotics. The defendant told Deputy Rubino "go ahead." Deputy Fortunato then conducted a sweep of the vehicle with his K-9. The K-9 alerted on a purse inside the car. Deputy Fortunato took the purse from the K-9's mouth. Deputy Fortunato found a kilo of suspect cocaine as well as a checkbook with the Defendant's name on it in the purse. The Defendant was placed under arrest at that point. She then made certain statements against her own interests on the scene. The Defendant and her passenger were taken to a Broward County substation. At the substation Deputy Rubino read the Defendant her *Miranda* rights from a card. The Defendant stated she understood her rights.

As a result the Court finds

1. The Defendant made statements after being arrested but before being advised of her *Miranda* rights,
2. Said statements were against the defendant's own interests, and
3. The defendant's statements were in reply to questions asked her by Deputy Rubino and Deputy Fortunato.

THEREFORE IT IS ORDERED AND ADJUDGED that the Defendant's Motion to Suppress Admissions and Statements made by the Defendant after arrest but before *Miranda* rights being read is hereby granted.

DONE AND ORDERED in Fort Lauderdale, Broward County Florida, this 21 day of July, A.D. 1992.

HONORABLE STANTON S. KAPLAN
Judge of the Circuit Court

copies furnished:

Michael J. Entin
Attorney for the Defendant

Dale H. Geisler
Assistant State Attorney
Drug Trafficking Unit

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NO. 90-22943 CF10A
JUDGE: KAPLAN

JANICE McLEOD,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE AND TESTIMONY RELATING THERETO

THIS CAUSE having come on to be heard before me upon Defendant's Motion to Suppress Physical Evidence and Testimony Relating Thereto, and the Court having conducted extensive hearings in this matter, and being otherwise fully advised in the premises, hereby makes the following factual findings and rulings in this cause:

ORDERED AND ADJUDGED that:

1. The Court finds that the testimony of Deputy Pete Fortunato and Deputy Steve Rubino, would support that the stop of the Defendant, JANICE L. MCLEOD, was not pretextual and done pursuant to a traffic investigation.

2. The Court further finds that the testimony would further support that the police officers did not have any prior knowledge that Ms. McLeod or the passenger were involved in any criminal activity. Testimony would show that subsequent to the traffic stop of the Defendant, Deputy Steve Rubino requested the consent of the Defendant to search the vehicle. He ad-

vised her that U.S. 27 is a highway which is used to tranship drugs and that the travelling public is routinely requested to offer cooperation in confiscating narcotics. He requested to search her vehicle, and the Defendant agreed. Although McLeod contends that the search of her vehicle was involuntary, this court makes a finding that there is substantial competent evidence to support that her consent was uncoerced.

3. This Court concludes however, that the search actually conducted in this matter exceeds the scope of the consent given. "When the police are relying upon consent to conduct a warrantless search, they have no authority than that reasonably conferred by the terms of the consent." *State v. Wells,* 539 So. 2d 464, 467 (Fla. 1989).

In the present case, the consent given by McLeod could reasonably be construed to allow the officers to search the interior of her vehicle. Subsequent to consent being give, the officers utilized a narcotics detection dog to search the vehicle and its contents

The Court finds that the officers exceeded the scope of the Defendant's consent by utilizing the narcotics dog to search the vehicle without her expressed permission. The Court further finds that there was no specific request for consent to use the drug detection dog, and that no circumstances existed from which consent to the use of the drug detection dog could reasonably be implied.

The Court, therefore, vacates it previous ruling denying this Motion to Suppress on July 21, 1992, pursuant to the recent decision of *Dominguez v. State of Florida,* 17 FLW D2664 (Third DCA Dec. 1, 1992) and for other reasons stated in this Order.

The Court therefore, GRANTS the Defendant' Motion to Suppress Physical Evidence in this cause and orders that

all evidence be suppressed as a result of the search of the Defendant's vehicle on November 7, 1990.

DONE AND ORDERED in Chambers Ft. Lauderdale, Broward County, Florida on this 1 day of February, 1993.

_____

HON. STANTON S. KAPLAN
Circuit Court Judge

Copies furnished to:

MICHAEL J. ENTIN, ESQ.

STATE ATTORNEY'S OFFICE

CERTIFICATE OF SERVICE

I, Joan Fowler, a member of the Bar of this Court, hereby certify that on this ____ day of December, 1995, ___ copies of the petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Richard L. Rosenbaum, Esq., Law Offices of Richard L. Rosenbaum, One East Broward Boulevard, Suite 1500, Barnett Bank Plaza, Fort Lauderdale, Florida 33301, counsel for the Respondent. I further certify that all parties required to be served have been served.

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COUNSEL FOR PETITIONER